No. 488

JUL 19 1922
WM. R. STANSB
CLE

IN THE

Supreme Court of the United States

CHARLES L. CRAIG,
Petitioner,

vs.

WILLIAM C. HECHT, United States Marshal for the Southern District of New York,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

and

BRIEF IN SUPPORT OF MOTION

JOHN P. O'BRIEN,
Corporation Counsel City of New York,
Attorney for Petitioner,
Municipal Building,
City of New York

EDMUND L. MOONEY,
Of Counsel.

Supreme Court of the United States

CHARLES L. CRAIG,
Petitioner,
vs.
WILLIAM C. HECHT, United States Marshal for the Southern District of New York,
Respondent.

Motion for Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit.

Comes now Charles L. Craig, by John P. O'Brien, Corporation Counsel of the City of New York, his solicitor, and George Sutherland and Edmund L. Mooney, of Counsel with the Corporation Counsel, and moves this Honorable Court that it shall by certiorari or other proper process directed to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, require said Court to certify to this Court, for its review and determination, a certain cause in said Court of Appeals lately pending entitled "In the Matter of Charles L. Craig, petitioner-appellee, Thomas D. McCarthy, United States Marshal for the Southern District of New York (William C. Hecht, substituted in his place), appellant"; and to that end he

now tenders herewith his petition and brief with a certified copy of the entire record in said cause in said Circuit Court of Appeals for the Second Circuit.

JOHN P. O'BRIEN,
Corporation Counsel of the
City of New York,
Attorney and Counsel for Petitioner.

GEORGE SUTHERLAND,
By
Challen B. Ellis,
EDMUND L. MOONEY,
Of Counsel.

SUPREME COURT OF THE UNITED STATES,

CHARLES L. CRAIG,
Petitioner,

vs.

WILLIAM C. HECHT, United States Marshal for the Southern District of New York,
Respondent.

Petition for Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Charles L. Craig, respectfully represents:

I. At all times hereinafter mentioned your petitioner was and now is Comptroller of the City of New York, the chief financial officer of said City, and, as such, a member of the Board of Estimate and Apportionment of said City, duly qualified and acting as such. On November 8, 1921, your petitioner was duly re-elected for a term of four years from January 1, 1922, as such Comptroller of the City of New York, and as such Comptroller is performing the duties of such office.

II. Your petitioner presented to your Honorable Court an earlier application for a writ of certiorari and/or mandamus, seeking to have cer-

tain questions herein considered, especially because of conflict between Courts of Appeals of different circuits on jurisdictional matters. Your petitioner did this in the belief that your Honorable Court had sole jurisdiction in the premises. But the Solicitor General opposed the application on the ground that it was premature, or to use his language, a "short cut across a lot" (Brief of Solicitor General, p. 5), and suggested that consideration by this Court should await the determination of the Circuit Court of Appeals on the questions involved (*id.*, pp. 6-8). Thereupon your petitioner's earlier application for a writ was refused. Then the appeal was argued before the Circuit Court of Appeals for the Second Circuit, and decided adversely to your petitioner by a divided Court, District Judge LEARNED HAND dissenting in an opinion. Even in the opinion of the Court, written by Circuit Judge HENRY WADE ROGERS, with whom Circuit Judge CHARLES M. HOUGH concurred, appear these words:

> "If this court is in error in the conclusion at which the majority of the court has arrived it is by no means impossible that the Supreme Court can correct any mistake we may have made" (Record, p. 1160).

Your petitioner presents this application in the belief that the questions of public moment set forth in Paragraph XXVII below should be considered by your Honorable Court.

III. Heretofore and on February 24, 1921, the United States District Court for the Southern District of New York, held by Hon. JULIUS M. MAYER, District Judge, entered an order in the office of the Clerk of said District Court assuming to adjudge

your petitioner, Charles L. Craig, Comptroller of the City of New York, in contempt of court (Record, p. 838) for writing and sending the following letter in his official capacity:

"October 6, 1919.

"Hon. Lewis Nixon,
Public Service Commissioner,
No. 49 Lafayette Street,
New York City.

Dear Sir:

Replying to your letter of October 1st:

Apparently without inquiry and without information, you have fixed the time for the proposed conference upon a date which, if observed, would require the members of the Finance and Budget Committee of the Board of Estimate and Apportionment (comprising the entire Board), to drop the preparation of the largest budget in the history of New York City, in which work, as you could easily have ascertained, they have been for some time and must continue to be engaged in daily sessions from early to late.

In your letter you say:

'It may be necessary to review figures and examine leases and agreements that will consume time.'

Before any such conference can be seriously considered, and as an evidence of good faith on the part of those acting by and under the authority of United States District Judge Mayer, there must be a reversal of the policy for which Judge Mayer is responsible, of denying to myself and other members of the Board of Estimate and Apportionment any access to original sources of information concerning the property and affairs of these various public utility corporations holding franchises to operate in the streets of New York.

When the applications were made to Judge Mayer in the 'friendly' proceedings instituted by those interested in these corporations for the appointment of a Receiver of their own liking, if not of their own selection, the Corporation Counsel of the City of New York acting under instructions from the Board of Estimate and Apportionment given at my instance, urged upon Judge Mayer that he appoint an additional or co-receiver acceptable to the Board of Estimate and Apportionment, to see that the facts and conditions of the corporations involved were fairly and fully presented to the United States District Court in the course of the receivership, so that any orders or decrees that might be made by the Court would be fair and just to The City of New York, and the members of the Board of Estimate and Apportionment might be accurately informed with respect thereto in order that any action deemed necessary by the City might be taken.

As you must be aware, it is a very common thing in large receiverships to appoint additional receivers, particularly where there are varied and conflicting interests; and I have never been able to understand why in a matter of great public concern such as this, Judge Mayer set himself against it. It was clearly understood that conditions were certain to develop in these receiverships where the responsible authorities would be urged to take action which no honest or intelligent man could be expected to consider without the most exact and complete information upon the entire subject. Judge Mayer refused to grant any of the relief sought by the City. He not only denied the relief, but he made orders which preclude any application being made by the Municipal authorities to any other Court or Judge for any right of examination into the affairs or conditions of these corporations seeking Municipal aid and favor.

Truth is the mightiest weapon in every controversy. The orders of Judge Mayer deny to the Municipal authorities the opportunity to ascertain the truth.

The franchises and rights enjoyed by these corporations were mostly all procured many years ago when corrupt political rings were in control of public affairs and the darkest scandals of Municipal history, both in the old City of New York and in the City of Brooklyn, prior to consolidation, are those in relation to such grants. The affairs of the franchise holding corporations have been in the hands of the boldest and most unscrupulous manipulators engaged in the exploitation of the rights obtained from corrupt political rings. Up to the present moment they have defied every power that has sought to open up the books and original records for search and examination in the public interests. They will open and open wide without any reservations or restrictions before there will be any conference so far as I am concerned.

It seems to me a monstrous thing that an order of a Federal Judge in a Court of Equity should stand between the public and the truth under such circumstances. Such an order is hostile to every interest of The City of New York in these controversies. Its operation and effect is to disarm the Municipal authorities, to deny them the most effective instrument of redress, and to force them into a contest with corporate powers entrenched in darkness and concealment.

The responsibility for the turmoil, delay and dissatisfaction that has followed upon the orders of Judge Mayer, denying to The City of New York any representation in these receiverships, rests upon those who procure and are protected by such orders.

As a first and preliminary evidence of good faith, those who desire such a conference and a reasonable solution of existing complications,

should procure the entry of orders by Judge Mayer putting The City of New York on an equal footing with the private interests active in the receiverships. A refusal to do this can but prolong and embitter the controversy; and it will not in the end procure any advantage whatever to the traction interests.

Yours very truly,

CHARLES L. CRAIG,
Comptroller."

(Record, p. 8 *et seq.*)

The circumstances under which the foregoing letter was written are set forth in paragraphs XII to XV of this petition.

IV. On February 24, 1921, on motion of the United States Attorney, said Court assumed to sentence your petitioner to a term of sixty days at the Essex County Jail at Newark, in the State of New Jersey, for such alleged contempt of court. (For commitment, see Record, at page 37.) Thereupon your petitioner was taken into custody by Thomas D. McCarthy, then United States Marshal for the Southern District of New York, and while in the custody of the Marshal, presented a petition to the Hon. Martin T. Manton, Circuit Judge of the United States for the Second Circuit, for a writ of habeas corpus requiring your petitioner to be brought before him to inquire into the cause of your petitioner's detention. (For petition, see Record, at pages 33-88, 821-840.)

Said Circuit Judge had theretofore, on the 18th day of February, 1921, been designated and appointed by the senior Circuit Judge of the Second Circuit, pursuant to Section 18 of the Judicial Code, to hold a session of the United States District

Court for the Southern District of New York, for the trial of causes and for the hearing and disposing of such *ex parte* and other business as might come before him during the period beginning February 21, 1921, and ending March 5, 1921, and was at the time of your petitioner's application acting under such designation, at Chambers, the District Court not being then in session (Record, pp. 868, 882, 887).

In the said petition your petitioner averred that he had been deprived of his liberty without due process of law contrary to the Constitution of the United States and the amendments thereto, in that District Judge Mayer acted in excess of jurisdiction and in excess of the jurisdiction of said District Court held by him in assuming to adjudge your petitioner guilty of contempt of Court and sentencing your petitioner therefor.

Thereupon said Circuit Judge Manton granted the petition of your petitioner and issued the writ thereon. The petition (including the annexed Exhibits) is set forth at pages 33 to 88 and 821 to 840 of the printed record herewith submitted. Thereupon said writ, together with a copy of said petition, was served upon said Marshal and pursuant thereto, said Marshal produced the body of your petitioner before Circuit Judge Manton forthwith, and the further hearing in the matter, upon the application of the United States District Attorney, appearing in behalf of said Marshal, was adjourned until March 3, 1921, at which time a formal Return to said writ by said Marshal was made and submitted by said District Attorney to Circuit Judge Manton. Your petitioner thereupon submitted to Circuit Judge Manton, at Chambers, his Denial and Traverse to the Return of said

Marshal. Said Return and Traverse appear at pages 841 to 868 of the printed record herewith submitted. Thereupon said Circuit Judge at Chambers proceeded to determine the facts of the case by hearing testimony and arguments and to dispose of your petitioner as law and justice required (Record, pp. 869-887). Upon the hearing all the evidence on the trial before Judge Mayer was received in evidence (Record, pp. 878-880, 887, 89-820, 889-1128).

V. Thereupon said Circuit Judge rendered his opinion and decision (274 Federal Reporter, p. 177), holding that the District Court had exceeded its jurisdiction by an excess of power in assuming to adjudge your petitioner guilty, and made an order discharging your petitioner and directing that the papers in the habeas corpus proceeding be filed with the Clerk of the United States District Court for the Southern District of New York, in his office at the Post Office Building, in the Borough of Manhattan, City of New York, and that the order of discharge be recorded in said Court. Copies of said decision and order appear in the printed record submitted herewith at pages 6 to 32 thereof.

Said order was made and filed on the 29th day of April, 1919. Your petitioner relied on his discharge under said order of Circuit Judge Manton and did not present to District Judge Mayer for signing any bill of exceptions of the trial in the contempt proceeding, prior to the expiration of the time therefor under the rules and practice of said District Court. The time so to do expired on the 24th day of May, 1919, and before the appeal from said order of discharge was applied for and allowed.

VI. After your petitioner's discharge in the habeas corpus proceeding aforesaid, and on or about July 25, 1921, said Marshal presented to Honorable Charles M. Hough, United States Circuit Judge of said Second Circuit, certain assignments of error, dated July 25, 1921, together with the petition of said Marshal of the same date, and thereupon said Circuit Judge assumed to allow to said Marshal an appeal from said order of discharge, in said habeas corpus proceeding, to the United States Circuit Court of Appeals for the Second Circuit. Circuit Judge Hough at the time issued a citation, citing and admonishing your petitioner to appear before the said Court of Appeals on August 25, 1921, pursuant to the order allowing said appeal, to show cause, if any there be, why the order of Circuit Judge Manton mentioned in the said order allowing said appeal, should not be corrected and why speedy justice should not be done in that behalf (Record, pp. 1-5).

VII. Thereafter, at the earliest possible date, your petitioner moved said Circuit Court of Appeals to dismiss said appeal for the jurisdictional reasons set forth in said motion, which said motion was subsequently denied by said Court, all of which appears more fully in the record filed upon your petitioner's previous application to your Honorable Court referred to in Paragraph II hereof.

VIII. Thereafter said Marshal resigned and Wm. C. Hecht was commissioned as his successor, and was thereupon made party to said appeal in the place and stead of said Marshal McCarthy (Record, p. 1130).

IX. Thereafter and on or about the 29th day of May, 1922, said Circuit Court of Appeals en-

tered its decree reversing said order and remanding your petitioner to the custody of said Marshal and directing the issuance of the mandate accordingly; (Record, p. 1179) but prior thereto, on the 23d day of May, 1922, said Court, by order of said Circuit Judge ROGERS, directed that said mandate be withheld and the execution of your petitioner's sentence be stayed upon condition that this application be docketed on or before August 29, 1922, and, in the event that this application be so made, until your Honorable Court passes upon and disposes of this application and until the further order of your Honorable Court in the premises.

X. Under the decisions of your Honorable Court, your petitioner, as now advised, has no right to review by appeal or writ of error the determination of said Circuit Court of Appeals in the appeal as aforesaid. Your petitioner respectfully submits that said Circuit Court of Appeals heard and determined said appeal without jurisdiction in the premises and without any adequate remedy at law to your petitioner for review of its determination on said appeal. Your petitioner claims that the proceedings of said Circuit Court of Appeals in the premises were wholly without warrant of law and are therefore null and void.

XI. A question is involved in the said proceeding and in this application of great public importance and urgency. Your petitioner is daily confronted with the possibility of being imprisoned in a State foreign to the State in which he is exercising his official functions and duties and of being prevented thereby from performing the same, and is also confronted with the possibility of additional imprisonment for a like or similar exercise of the

functions of his office in accordance with his conscientious convictions as to his duties under his oath of office and is prevented from freely exercising the same.

XII. The circumstances under which the letter which formed the basis of the contempt proceedings was written were as follows:

XIII. Prior to the writing of the letter complained of, and between December 31, 1918, and March 31, 1919, the Brooklyn Rapid Transit Company, the New York Municipal Railway Corporation, the New York Consolidated Railway Company and the New York Railways Company, all operating street, subway or elevated railways in the City of New York, found themselves in financial difficulties and receivers in equity were appointed by District Judge MAYER (Record, pp. 951-955, 1052-1073). The Interborough Consolidated Corporation, also a railway corporation, was declared a bankrupt and a receiver of its assets was appointed (Record, p. 914, fol. 2742; p. 529). On January 15, 1919, the City of New York, pursuant to resolution of the Board of Estimate and Apportionment, through its Corporation Counsel, applied to the District Court, on the motion for the appointment of the permanent receiver, for the appointment of a co-receiver in the Brooklyn Rapid Transit Company suit. It was sought to have the Comptroller, your petitioner, appointed receiver. The intention was that he would serve without compensation and thus look after the interests of the City of New York. The City was interested in representing its citizens as well as protecting its great financial and other rights under the various franchises granted to the Railway Corporation (Record, pp. 1008-

1052). The Court denied the application for the appointment of a co-receiver. This denial was upon the merits, but the opinion stated that it was "without prejudice to its renewal at such time as counsel may be advised" (Record, pp. 1068-1073). No further application for the appointment of a co-receiver was made before the petitioner wrote and sent the letter which is the subject of the charge for contempt. The controversy between the officials of the City and those who had charge of the affairs of the railway companies was very spirited. An application was made before the Board of Estimate and Apportionment for an increase in fare and this gave rise to hostility in the controversy.

XIV. Between the time of the appointment of receivers and the 1st of October, 1919, expert accountants appointed by the Court, made an examination of the books and made a report as to the financial condition of the company and suggestions were made as to the requirements of the company.

XV. Mr. Lewis Nixon was the Public Service Commissioner for the First District of the State of New York, which district embraces the City of New York. Under the statute the Commissioner had certain regulatory powers over the said railways, especially with reference to rates and charges (Public Service Commission Law, N. Y. Laws 1907, C. 429, Sec. 49, as amended by L. 1911, C. 546). On October 1, 1919, Mr. Nixon called for a conference to be held in the City of New York on October 6th, following, for the purpose of discussing the financial and physical condition of the traction lines of the City of New York, including the Brooklyn Rapid Transit Company. He invited the officials of the City of New York, including your

petitioner, to this conference. On October 6, 1919, your petitioner wrote and caused to be sent the letter which formed the basis of the contempt proceeding and which is set forth in Paragraph III of this petition. The letter was in response to the official invitation to the conference and was signed by your petitioner in his official capacity (Record, pp. 733-736).

XVI. Your petitioner was a witness in his own behalf in the proceeding to punish him for the alleged contempt. He gave testimony as to his intention and purposes in writing the letter referred to: The letter from Commissioner Nixon came to him on the morning of October 6th and was one of the many things he had to attend to on that morning. His letter, in reply, was written in considerable haste and the writer's purpose was to "get into the mind of Nixon the necessity for that kind of co-operation resulting in the public authorities being on an equal footing with those representing the traction interests." Your petitioner testified further that it was physically impossible for him to have attended the conference on October 6th; that he did not expect the Commissioner to read the letter at the conference; that the letter was not intended for anyone but the Public Service Commissioner; that the letter reached the public press through a usual routine of giving out letters for publication which prevailed in the Department of Finance; that this was done through the Secretary of the Finance Department, who was an appointee of and paid by the City. Your petitioner further testified as to what he intended by the language employed in the letter; that what your petitioner meant by "original sources" was that letters and comments of

the railroad companies were kept in their archives, and your petitioner meant by denying access to original sources, inability to have "full and unrestricted access with power to compel any subordinate to produce or dig up whatever it might be, or be suspected of being, all of the facts that relate to these companies," "that anything that cut us short of that was a denial of access to the original sources, and that the very purpose of the application that had been made to the United States District Court for the appointment of a co-receiver was to have someone who was in a position to bring about these disclosures, and the necessary effect of the order denying that application was to deny to the municipal authorities in question that kind of access to the original sources." Your petitioner further testified how and in what respects it was important to the financial interest of the City of New York and to its citizens, to have its officials well informed of the matters pertaining to the railroad company's affairs; and that the most feasible and practicable way to this end was that a co-receiver be appointed who, in some way, would be representative of the City. Your petitioner denied upon oath that at any time he intended to convey the meaning that the District Judge had, in point of fact, denied access to original papers, except insofar as such denial might flow from his refusal to appoint him co-receiver (Record, pp. 573-587; 600-612).

XVII. At the time that said letter was written, there was not pending *sub judice* in said Court before District Judge Mayer or any other Judge thereof, awaiting decision, any order or judicial determination in said receivership suit or in any other

suit or proceeding relating to said traction lines. The subject matter of the criticism in your petitioner's letter was not then pending *sub judice;* but, on the contrary, had long before been disposed of.

XVIII. At no stage of the contempt case, nor in the proceeding in habeas corpus, has it ever been contended or claimed that any proceeding was pending *sub judice* that could possibly have been affected by the writing of the letter in question, but on the contrary, it was expressly disclaimed that there was awaiting decision any order or judicial determination mentioned in said letter. The return of the Marshal to the writ of habeas corpus is explicit and definite as to this:

> "On October 6, 1919, there was not pending awaiting decision any order or judicial determination mentioned in the letter of that date from the petitioner to Lewis Nixon set forth in the Information, but the same was still within the control of the District Court of the United States for the Southern District of New York and subject to change."
>
> (Record, pp. 842-3, Paragraph IV)

XIX. In the contempt proceeding the information, for the purpose of establishing jurisdiction, averred the pendency of certain suits and a bankruptcy proceeding (Record, pp. 44-45). Numerous papers and proceedings of record therein were proven by the District Attorney in his effort to establish some matter *sub judice* before the District Court at the time of the writing of the letter of October 6, 1919. The whole of the evidence on the contempt trial is printed in the Record (pp. 887, 1128, 879-880; testimony, pp. 89-730); and every paper or proceeding proved in this effort on the part of the Government to establish that, at the

time of the letter, some matter was under judicial cogitation, appears in pages 889 to 1128, inclusive, but nowhere does it appear that there was then any matter under judicial deliberation or consideration.

The District Court based its jurisdiction in the contempt proceeding on the proposition that, regardless of whether there was any "definite matter * * * to be disposed of by the Court's order, judgment or decree," as there was a receivership suit or proceeding pending in which "the Court would be called upon from time to time to make orders and decrees," * * * until "the property is no longer in the court, and the Court by its final decree or proper order has released the property from its custody, and *has no further duty to perform,*" the suit or proceeding is "in every sense pending," so as to give the Court jurisdiction to punish for contempt any criticism of its accomplished act or fact (Opinion of the Court, *United States* v. *Craig,* 266 Fed. 230, 234, referred to in the Record at page 825). In other words, the District Court held that, if any matter pertinent to the receivership property were still susceptible of judicial consideration, criticism of the Court's acts could be punished as contempt of court, if the criticism could at any time influence the Court in any possible action relating to the receivership property.

XX. The facts and circumstances which were the cause and pretext of the detention of your petitioner are as follows:

XXI. On or about November 13, 1919, an Information was filed in the office of the Clerk of the District Court of the United States for the South-

ern District of New York. A copy of said Information is set forth in the Record at pages 44 to 70.

XXII. Thereupon an order was made by District Judge Mayer dated November 20, 1919, requiring your petitioner to show cause why he should not be declared and adjudged in contempt of the United States District Court for the Southern District of New York, by reason of the facts set forth in said Information (Record, page 71). Your petitioner appeared involuntarily (Record, p. 75) and challenged the jurisdiction of the Court at every stage of the proceedings.

XXIII. On such objection being overruled, and exception being duly taken thereto, your petitioner demurred to the Information charging him with contempt of Court (Record, p. 82). Such demurrer was overruled (266 Federal Reporter, p. 230). Thereupon your petitioner entered a plea of not guilty (Record, p. 88). Your petitioner asked that another Judge of the District Court be designated to hear the proceeding (Record, p. 532), but said requests and each of them was overruled by District Judge Mayer, to which exception was duly taken by counsel for your petitioner.

XXIV. District Judge Mayer assumed to try your petitioner, and thereupon handed down or filed his decision or opinion (Record, pp. 821-837); and on or about February 24, 1921, said District Judge assumed to sign an order in and by which he assumed to find and declare your petitioner in contempt of said Court as charged in said Information in respect of the matters set forth in Paragraphs 1, 2, 3 and 4 of said Information, and further assumed to require your petitioner to appear before said Court on Febru-

ary 24, 1921, for further proceedings therein (Record, pages 838-839).

XXV. Thereafter, on the 24th day of February, 1921, District Judge Mayer assumed to sign an order or commitment directing that your petitioner be imprisoned for a term of sixty days, sentence to be executed at the Essex County Jail, Newark, New Jersey. A copy of this order is set forth in the printed record submitted herewith, at page 37 thereof. Thereupon and forthwith your petitioner was taken into custody by the United States Marshal for the Southern District of New York for imprisonment under the provisions thereof.

XXVI. Then followed the habeas corpus proceedings above set forth and the discharge of your petitioner and the proceedings upon said Marshal's appeal.

XXVII. Your petitioner submits that the judgment of the Circuit Court of Appeals for the Second Circuit should now be brought here for review by Your Honorable Court, for the following

REASONS:

1. Because there is involved the jurisdictional authority of a Circuit Judge as such, to issue a writ of habeas corpus, the Circuit Court of Appeals having denied that authority, notwithstanding its unbroken exercise since the creation of the office of Circuit Judge, and notwithstanding that there has been no express amendment of the Habeas Corpus Act in that respect.

The Marshal's return to the writ of habeas corpus contains the following on this point (p. 842 of Record):

> "It is respectfully urged that your Honor is and was without jurisdiction or authority to issue any writ of habeas corpus to the petitioner herein, because no provision of the laws of the United States vests authority to issue writs of habeas corpus in any Circuit Judge or in any judge of the United States Circuit Court of Appeals."

The Assignment of Errors (p. 2 of Record) contains the following:

> "I. The Circuit Judge erred in signing and granting the paper called the writ of habeas corpus herein because the said Circuit Judge had no power or jurisdiction to grant or sign the same.
>
> "II. Said Judge erred in denying the motion made by respondent to dismiss the proceeding upon the ground that the said Circuit Judge of the United States had no jurisdiction or power to grant or issue a writ of habeas corpus or discharge on a writ of habeas corpus."

The Circuit Court of Appeals in the instant case has expressly held that a Circuit Judge has no such power. To maintain that jurisdictional foothold, the Court has held, in legal effect, that the order appealed from was an order of the District Court (Record, p. 1141), which your petitioner stoutly denied.

This Court has held that the Circuit Court of Appeals has no power to issue a writ of habeas corpus (*Whitney* v. *Dick*, 202 U. S., 132), but it has never been held, until the decision in the instant case, as far as your petitioner is informed, that a Circuit Judge had not that power.

However the question may ultimately be decided, it is obviously one of great importance since it in-

volves the jurisdictional authority of thirty-four Circuit Judges and the newly created Circuit Judges throughout the United States, and thereby confines the issuance of such writs, for practical purposes, to the District Courts and the District Judges.

2. Because the Circuit Court of Appeals has assumed to review upon appeal an order of a Circuit Judge discharging your petitioner in habeas corpus although under the uniform decisions of Your Honorable Court no appeal lies from an order of a Judge; but only an order of a Court may be reviewed by appeal or writ of error (*Carper* v. *Fitzgerald,* 121 United States, 87; *In re Lennon,* 150 United States, 393; *McKnight* v. *James,* 155 United States, 685; *Lambert* v. *Barrett,* 157 United States, 697; *Harkrader* v. *Wadley,* 172 United States, 148) and thereby the Circuit Court of Appeals for the Second Circuit failed to follow or give force or effect to the rulings and decisions of your Honorable Court on the legal questions involved.

3. Because, in entertaining jurisdiction of the appeal from the order of Circuit Judge Manton discharging your petitioner, there is a direct conflict of decision upon the appealability of a Judge's order with the Circuit Court of Appeals for the Fifth Circuit, which held that a Circuit Court of Appeals had no appellate jurisdiction to review such an order (*Hoskins* v. *Funk,* 239 Fed., 278). In the interest of uniformity of decision which, therefore, cannot otherwise be established, it is necessary that this Court should interpose for the purpose of settling the conflict.

4. Because the Circuit Court of Appeals has assumed to consider the order of Circuit Judge

MANTON discharging your petitioner as an order of the District Court (Record, p. 1141), so as to assume jurisdiction of an appeal therefrom, notwithstanding your Honorable Court has held that such an order is not an order of a court (*Carper* v. *Fitzgerald,* 121 U. S., 87).

5. Because the order discharging your petitioner, from which said Marshal appealed to the Circuit Court of Appeals, and the decision upon which it rested, as also the said appeal, involved the construction and application of the Constitution of the United States, in that your petitioner based his application for a writ of habeas corpus on the fact that he had been deprived of his liberty without due process of law in violation of the fifth amendment of the Constitution of the United States, inasmuch as the District Court acted in excess of its jurisdiction in assuming to convict your petitioner of contempt of Court. *Ex parte Hudgings,* 249 U. S., 378; *Ex parte Royall,* 117 U. S., 241; *Ex parte Lange,* 85 U. S. (18 Wall), 163; *New York* v. *Eno,* 155 U. S., 89; *In re Loney,* 134 U. S., 372; *Ex parte Siebold,* 100 U. S., 371; *Ex parte Parks,* 93 U. S., 18. The appellate jurisdiction of the Circuit Court of Appeals does not extend to such a case, of which your Honorable Court had exclusive jurisdiction by direct appeal. Judicial Code, Sec. 238; *Raton Waterworks Co.* v. *City of Raton,* 249 U. S., 552; *Union & Planters Bank* v. *City of Memphis,* 189 U. S., 71; *Carolina Glass Co.* v. *State of South Carolina,* 240 U. S., 305, at pages 317 to 319; *Horn* v. *Mitchell,* 243 U. S., 247; *Greene* v. *Louisville & I. R. R. Co.,* 244 U. S., 499; *Pierce* v. *Creecy,* 210 U. S., 387; *Horner* v. *United States* (1892), 143 U. S., 207.

6. Because the letter which was made the basis of the criminal contempt charge was the subject of absolute privilege (*Spalding* v. *Vilas*, 161 U. S., 483 *Dearnaud* v. *Ainsworth*, 24 App. D. C., 167; 5 L. R. A. (N. S.), 163; *Farr* v. *Valentine*, 38 App. D. C., 413; *Chatterton* v. *Secretary of State for Inda*, 2 Q. B. (1895), 189; *Dawkins* v. *Paulet*, L. R., 52 B., 94; *Beatson* v. *Skene*, 5 Hurl. & Nor. (Exheq.), 823.

7. Because your petitioner was declared guilty of contempt of court "as charged," though there was no contempt, especially within the limitations of Section 268 of the Judicial Code, either in the substance or the language of the letter which was made the basis of the charge.

8. Because there was no misbehavior and no tendency to obstruct the administration of justice in the letter which was made the basis of the contempt charge (*In re Hudgings*, 249 U. S., 378).

9. Because no judicial determination of any character whatsoever was pending *sub judice* in the District Court at the time of the letter, which was made the basis of the contempt charge; and criticism of the courts, after the conclusion of judicial cogitation, is not punishable as contempt, even if the criticism be unwarranted (*Patterson* v. *Colorado*, 205 U. S., 454, 463).

10. Because by the decision in question the fundamental right of free speech and free publication, which belong to your petitioner under our form of government, and under the guaranties and implications of the Constitution of the United States, by which judges and courts in respect of their past actions are subject to criticism as other people, has

been infringed, contrary to the decisions of this Court.

11. Because the act complained of was not criminally contemptuous since it was not wilful nor with criminal intent; nor was the publication thereof charged to be wilful or with criminal intent; and your petitioner was declared guilty only "as charged."

12. Because, if the adjudication of the District Court be deemed to imply that it declared your petitioner guilty of contempt in obstructing the administration of justice, in that your petitioner's conduct tended and was intended to influence the Court in the consideration of the receivership proceeding, to intimidate the Court and to compel it to decide future questions as your petitioner wished, and to obstruct the Court's orders in such suits, nowhere has it appeared in proof or allegation what future decisions would or could in fact have been influenced. The whole record in the contempt proceedings is in this record (see Record, pp. 887, 1128, 879-880) and therefrom it appears that nothing was pending at the time or was imminent on which the Court was to act (Record, pp. 889-1128; 89-730).

13. Because, if the adjudication of the District Court declaring your petitioner in contempt be deemed to imply that the publication of the letter in the newspapers was wilful, there was no allegation in the Information that the publication was made (a) wilfully, (b) knowingly, (c) unlawfully, or (d) contemptuously; and there was an absolute lack of any participation of your petitioner in effecting the appearance of the letter in any newspaper.

14. Because the ruling of Circuit Judge HOUGH, that a paper writing is not a writ of habeas corpus, when issued by a Judge but only his personal direction, unless "issued by a Court, returnable to the same," "under seal" and "tested by the proper officer" is contrary to the principles applicable to a writ of habeas corpus granted by a Judge in his capacity as Judge (see writ issued by Chief Justice WAITE in *Ex parte Curtis,* 106 U. S., 371, which had neither teste, seal nor clerk's signature, was signed "M. R. Waite, Chief Justice of the United States" and was returnable before "the Chief Justice of the Supreme Court of the United States" in New York City).

15. Because the case is of great and urgent public importance, in that said District Court is still operating, managing and controlling said railways through its receivers, while the City of New York, of which your petitioner is Comptroller and chief financial officer, is vitally and continuously interested in the traction situation and litigation which is the subject matter of the letter, for the writing of which your petitioner was declared to be in contempt, and in that your petitioner is daily confronted in the discharge of his official duties with the possibility of having to serve a sentence of sixty days in the Essex County Jail in Newark, State of New Jersey, which is beyond the confines of the jurisdiction where your petitioner exercises his official functions and which would render him *functus officio* for that period, and with the further possibility of additional imprisonment for a like or similar exercise of the functions of his office; and your petitioner is thereby prevented from freely exercising the same.

16. Because your petitioner, on November 8, 1921, was elected Comptroller of the City of New York for a further term of four years from January 1st, 1922, and as the chief financial officer of the City and a member of the Board of Estimate and Apportionment, it is his duty to pursue a definite policy to safeguard the financial interests of the City with regard to traction properties which are the subject of the receivership actions and proceedings now within the control of the United States District Court for the Southern District of New York, and because the Circuit Court of Appeals has assumed, without jurisdiction, as your petitioner contends, to review the order of the Circuit Judge discharging your petitioner on habeas corpus, and has reversed said order, your petitioner is prevented from pursuing, without the likelihood of further imprisonment, that policy which he conceives it to be his duty to pursue to properly safeguard the interests of the said City of New York in said traction properties while under the management, operation and control of the Court, which still continues, lest by word or act of a like or similar kind he be again put in jeopardy of a charge of contempt and imprisonment therefor.

17. Because at the present time and since the discharge of your petitioner and during the pendency of said appeal, a charter revision commission appointed under an Act of the Legislature of the State of New York (Laws of New York, 1921, Chapter 343) to consider and revise the charter of the City of New York has been and is considering provisions for the ownership and operation of public utilities embracing said street railways and subways, one of which is for municipal ownership and

operation, which necessarily calls for comment and criticism of the presently existing judicial control and operation through receivers of such public utilities. Your petitioner is a member of said Commission and he is embarrassed and circumscribed in the performance of his duties lest legitimate and necessary comment and criticism on such judicial control and operation be regarded as contemptuous. Honorable Julius M. Mayer, since his promotion from District Judge to Circuit Judge and on or about October 13th, 1921, has been designated by the senior Circuit Judge of the Second Circuit under Section 18 of the Judicial Code to hold a session of the District Court of the United States for the Southern District of New York for the trial of causes and the hearing and disposition of motions, and such ex parte and other business as may come before him during the period beginning October 13, 1921, and ending October 13, 1922, and under such designation is continuing in the management and control of such railways through the receivers appointed by him as District Judge.

Your petitioner believes that the judgment of the Circuit Court of Appeals for the Second Circuit reversing the order discharging your petitioner is erroneous and that your Honorable Court should require the said case to be certified to it for its review and determination, in conformity with the provisions of law and statutes in such cases made and provided.

Your petitioner presents herewith, as part of this petition, a brief showing more fully his views upon

the questions involved and also a transcript of the record in the Circuit Court of Appeals.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of Your Honorable Court to the Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and send to your Honorable Court on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case, therein entitled "In the Matter of Charles L. Craig, Petitioner-Appellee, Thomas D. McCarthy, United States Marshal for the Southern District of New York (William C. Hecht, substituted in his place), Appellant," to the end that said case may be reviewed and determined by your Honorable Court, as provided in Sections 240 and 262 of the United States Judicial Code; that your petitioner may have such other or further relief or remedy in the premises as your Honorable Court may deem appropriate and as law and justice may require, in conformity with the provisions of said Code and the Statutes in such cases made and provided, and that the said judgment of the said Circuit Court of Appeals in the said case and every part thereof, may be reversed by your Honorable Court.

And your petitioner will ever pray.

CHARLES L. CRAIG.
Petitioner.

JOHN P. O'BRIEN,
Corporation Counsel
of the City of New York,
Attorney and Counsel for Petitioner.

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK, } ss.:
COUNTY OF NEW YORK,

CHARLES L. CRAIG, being duly sworn according to law on his oath says: I am the petitioner herein. I have read the petition herein. The facts, matters and things set forth in said petition are true according to the best of my knowledge, information and belief. So far as they relate to my own acts, I know them to be true; so far as they relate to the acts of others, I believe them to be true.

CHARLES L. CRAIG.

Subscribed and sworn to before me this 13th day of July, 1922.

ANDREW R. McLAREN,
Notary Public.

(Notarial Seal)

We hereby certify that we have examined the foregoing petition, that said petition is true and that in our opinion it is well founded in point of fact, as well as law, and that the case identified thereby is one and is such that the prayer of the petition should be granted by this Honorable Court.

GEORGE SUTHERLAND,
By
Challen B. Ellis,
EDMUND L. MOONEY,
Counsel.

INDEX

PAGE

Importance of Questions Involved 9

Public Interest 9

Circuit Judges, Powers 9

Circuit Judge, *qua* Judge, had authority to issue Writ of Habeas Corpus..... 13

Habeas Corpus Act Provisions not repealed ..... 16 *et seq.*

Appealability of Judge's Order..... 28

Judge's Order not appealable..... 28

Court Order only may be reviewed by Circuit Court of Appeals 28

Assumption of Jurisdiction by Circuit Court of Appeals reviewing Judge's order Contrary to Decisions and Statutory Authority..... 28

Conflict of Decision of Second and Fifth Circuits upon appealability of Judge's Order..... 37

Exclusive Jurisdiction of this Court to Review Order discharging petitioner 39

Constitution of the United States, Its Construction and Application involved..... 39

Construction and Application of Constitution involved vests review in this Court..... 39

PAGE

Excess of Power raised in Habeas Corpus Proceeding 41

Contempt, Power of Federal Court to punish.... 41

Obstruction to Administration of Justice, necessary in Contempt 41

Powers of Federal Court to Punish for Contempt ..... 41 *et seq.*

Privilege of Public Officials Within the Scope of their duties 43

Sub Judice necessary ..... 44-46 *et seq.*

Sub Judice Matter 44, 46

Habeas Corpus Proper Remedy for Excess of Power 54

TABLE OF CASES

PAGE

American Const. Co. v. Jacksonville Ry. Co., 148 U. S., 372 11
Ayers, In re, 123 U. S., 443 54
Atlantic & N. C. R. Co. v. Cuyler, 131 Fed., 95.. 54
Ainsworth ads. De Arnaud, 24 App. D. C., 167.... 43

Barrett ads. Lambert, 157 U. S., 697.....26, 28, 34
Beatson v. Skene, 5 Hurl. & Nor. (Excheq.), 838 43
Bollman, Ex parte, 4 Cranch, 74.....17, 70
Belt, In re, 159 U. S., 95 59
Burford, Ex parte, 3 Cranch, 448..... 70
Bridges, Ex parte, 2 Woods, 428.....54, 55
Board of Control ads. Collins, 219 Fed., 885..... 40
Board of Trade ads. Merchants Stock & G. Co., 201 Fed., 20 62
Burke ads. Cross, 146 U. S., 82..... 34

Carper v. Fitzgerald, 121 U. S., 87.....
7, 26, 28, 29, 30, 31, 32, 33, 34, 35, 37
Conqueror, The, 166 U. S., 110.....11
Carolina Glass Co. v. State of So. California, 240 U. S., 305 40
Chatterton v. Secretary of State for India, 2 Q. B. (1895), 189..... 43
Chicago & N. W. R. R. Co. v. Osborne, 146 U. S., 354 11
Collins v. Board of Control, 219 Fed., 885..... 40
Creekmore v. United States, 237 Fed., 743..... 62
Cross v. Burke, 146 U. S., 82..... 34
Cuyler v. Atlantic & N. C. R. Co., 131 Fed., 95.... 54
Cuddy, Petitioner, 131 U. S., 280....54, 56, 58, 59, 61

PAGE

Carland ads. McClellan, 217 U. S., 268 11
Colorado ads. Patterson, 205 U. S., 454 ..... 42, 48
Creecy ads. Pierce, 210 U. S., 387 40
Clarke ads. United States, 1 Gall., 497 15
Craig, Ex parte (Circuit Judge Manton), 274 Fed., 177 6

Dawkins v. Paulet, L. R., 5 Q. B., 94 43
DeArnaud v. Ainsworth, 24 App. D. C., 167 43
Denver v. N. Y. Trust Co., 229 U. S., 123 11
Dock Bridges, Ex parte, 2 Woods, 428 ..... 54, 55
Davis, Ex parte, 112 Fed., 139 26
Daniels, In re, 131 Fed., 95 54
Dillingham ads. Moran, 174 U. S., 153 11
Dick ads. Whitney, 202 U. S., 132 ..... 15, 19, 33

Eno ads. New York, 155 U. S., 89 40

Farr v. Valentine, 38 App. D. C., 413 43
Forsyth v. Hammond, 166 U. S., 506 11
Fisk, Ex parte, 113 U. S., 713 54
Frank v. Mangum, 237 U. S., 309 ..... 54, 55
Fong Yue Ting v. United States, 149 U. S., 698 25
Fitzgerald ads. Carper, 121 U. S., 87 ..... 7, 26, 28, 29, 30, 31, 32, 33, 34, 35, 37
Fenton ads. Grammer, 268 Fed., 943 40
Funk ads. Hoskins, 239 Fed., 278 ..... 9, 38

Grammer v. Fenton, 268 Fed., 943 40
Greene v. Louisville & I. R. R. Co., 244 U. S., 499 40
Gordon ads. Marshall, 243 U. S., 521 65
Gounod ads. Metzler, 30 L. T. R., N. S., 264 47

PAGE

Hale, In re, 139 Fed., 496; 201 U. S., 43 15
Hammond ads. Forsyth, 166 U. S., 506 11
Hamilton ads. United States, 3 Dall., 17 70
Hamilton Shoe Co. v. Wolff Bros., 240 U. S., 251 11
Harkrader v. Wadley, 172 U. S., 148 ..... 28, 35
Horn v. Mitchell, 243 U. S., 247 40
Horner v. United States, 143 U. S., 207 40
Hoskins v. Funk, 239 Fed., 278 ..... 9, 38
Hudgings, Ex parte, 249 U. S., 378 ..... 6, 10, 40 42, 45, 54, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69

Jacobi, Ex parte, 104 Fed., 681 ..... 26, 28
Jacksonville Ry. Co. ads. American Consl. Co., 148 U. S., 372 11
James ads. McKnight, 155 U. S., 685 ..... 26, 28, 33

Kaine, Ex parte, 14 How., 103 70
Kearney, Ex parte, 7 Wheat., 38 55
King, In re, 51 Fed., 434 26

Lambert v. Barrett, 157 U. S., 697 ..... 26, 28, 34
Lange, Ex parte, 85 U. S., 163 (18 Wall, 163), 40, 54, 55, 70
Lennon, In re, 150 U. S., 393 ..... 28, 34
Loney, In re, 134 U. S., 372 40
Lamar v. U. S., 240 U. S., 60 59
Louisville & I. R. R. Co. ads. Greene, 244 U. S., 499 40
Ludlow-Sailer Wire Co. ads. Tyler Co., 212 Fed., 156 40

Marshall v. Gordon, 243 U. S., 521 65
Matters v. Ryan, 249 U. S., 375 23
Mayfield, In re, 141 U. S., 107 ..... 54, 59
Merchants Stock & G. Co. v. Board of Trade, 201 Fed., 20 62

PAGE

Metzger, Ex parte, 5 How., 176 70
Metzler v. Gounod, 30 L. T. R., N. S., 264..... 47
Moran v. Dillinghan, 174 U. S., 153..... 11
Milligan, Ex parte, 4 Wall., 2.....17, 55, 70
Macdonnel, In re, 11 Blatchford, 79..... 26
Mangum ads. Frank, 237 U. S., 309.....54, 55
Mitchell ads. Horn, 243 U. S., 247..... 40
Memphis, City of, ads. Union & Planters Bank, 189 U. S., 71 40

McCardle, Ex parte, 73 U. S., 318 .....18, 70
McClellan v. Carland, 217 U. S., 268..... 11
McKnight v. James, 155 U. S., 685.....26, 28, 33
McLish v. Roff, 141 U. S., 661 36

New York v. Eno, 155 U. S., 89 40
Nielson, Hans, Petitioner, 131 U. S., 176..... 54, 59, 67, 71
New York Trust Co. ads. Denver, 229 U. S., 123 11

Osborne ads. Chicago & N. W. R. R. Co., 146 U. S., 354 11

Parks, Ex parte, 93 U. S., 18 .....40, 56, 71
Patterson v. Colorado, 205 U. S., 454 .....42, 48
Pierce v. Creecy, 210 U. S., 387..... 40
Palliser, In re, 136 U. S., 257 35
Paulet ads. Dawkins, L. R., 5 Q. B., 94..... 43

Raton Waterworks Co. v. City of Raton, 249 U. S., 552 40
Reese, In re, 98 Fed., 984 54
Robinson, Ex parte, 19 Wall., 505 42
Royall, Ex parte, 117 U. S. 241.....40, 55
Robinson, Ex parte, 144 Fed., 835 54
Roff ads. McLish, 141 U. S., 661..... 36
Ryan ads. Matters, 249 U. S., 375..... 23

PAGE

St. Louis, K. C. & Col. R. R. Co. v. Wabash Ry. Co., 217 U. S., 247 ..... 11, 12
Schenck v. United States, 249 U. S., 47 53
Siebold, Ex parte, 100 U. S., 371 ..... 40, 54, 55, 56
Smith v. Vulcan Iron Works, 165 U. S., 518 11
Spalding v. Vilas, 161 U. S., 483 ..... 12, 43
Schmeid, Ex parte, 1 Dillon, 587 26
Skene ads. Beatson, 5 Hurl. & Nor. (Excheq.), 823 43
South Carolina, State of, ads. Carolina Glass Co., 240 U. S., 305 40
Secretary of State for India ads. Chatterton, 2 Q. B. (1895), 189 43

Three Friends, The, 166 U. S., 1 11
Toledo Newspaper Co. v. United States, 247 U. S., 402 ..... 42, 49, 50, 65
Toledo Newspaper Co. v. U. S., 237 Fed., 986 ..... 49, 51
Toledo Newspaper Co. ads. U. S., 220 Fed., 458 50
Tracy, J. A., Matter of, 249 U. S., 551 ..... 16, 23
Tyler Co. v. Ludlow-Sayler Wire Co., 212 Fed., 156 40

Union & Planters Bank v. City of Memphis, 189 U. S., 71 40
United States v. Clarke, 1 Gall., 497 15
United States v. Hamilton, 3 Dall., 17 70
United States v. Toledo Newspaper Co., 220 Fed., 458 50
United States ads. Toledo Newspaper Co., 247 U. S., 402 ..... 42, 49, 50, 65
United States ads. Toledo Newspaper Co., 237 Fed., 986 ..... 49, 51
United States, Ex parte, 226 U. S., 420 ..... 25, 26

PAGE

United States ads. Creekmore, 237 Fed., 743.... 62
United States ads. Fong Yue Ting, 149 U. S., 698 25
United States ads. Horner, 143 U. S., 207..... 40
United States ads. Schenck, 249 U. S., 47..... 53

Valentine ads. Farr, 38 App. D. C., 413..... 43
Vulcan Iron Works ads. Smith, 165 U. S., 518.... 11
Vilas v. Spalding, 161 U. S., 483.....12, 43

Watkins, Ex parte, 3 Pet., 193; 7 Pet., 568..... 70
Watts, In re, 190 U. S., 1..... 54
Wells, Ex parte, 18 How., 307 70
Whitney v. Dick, 202 U. S., 132 .....15, 19, 33
Wadley ads. Harkrader, 172 U. S., 148.....28, 35
Wolff Bros. ads. Hamilton Shoe Co., 240 U. S., 251 11
Wabash Ry. Co. ads. St. Louis, K. C. & Col. R. R. Co., 217 U. S., 247 .....11, 12

Yerger, Ex parte, 8 Wall., 85 70

TABLE OF STATUTES, Etc.

PAGE

Revised Statutes (of 1873):

Sec. 490 32
607 21
709 33
725 57
751 ..... 14, 21, 22, 54
752 ..... 14, 21, 22, 25, 28, 30, 54
754-5, 757-8, 760 14
761 ..... 14, 28, 55, 59, 61
762 14
763 ..... 14, 30, 34
764 ..... 30, 34
765 30
1014 ..... 14, 25, 26

Judicial Code (of 1911):

Sec. 128 ..... 34, 36
188 26
238 ..... 34, 36, 40
264 26
268 ..... 41, 43, 44, 53

Supreme Court Rule:

34 (117 U. S., 708) 30, 34

STATUTES AT LARGE

Year	Date	Vol.	Page	Chap.	Sec.	Subject	Page of brief
1789	Sept. 24	1	81	20	14	Judiciary	16, 17, 24, 70
1831	Feb. 3	4	437	16	4	Copyright	32
1831	Mar. 2	4	487	99		Contempt	42, 43, 55, 61, 68
1833	Mar. 2	4	634	57	7	Habeas Corpus	17, 24
1842	Aug. 29	5	539	257		Habeas Corpus, foreign citizens	22-3
1867	Feb. 5	14	385	28		Habeas Corpus	13, 18, 20, 21, 22, 24, 55
1868	Mar. 27	15	44	34		Judiciary	20
1869	Apr. 10	16	44	22	1, 2	Judiciary	13, 14, 20, 21, 22, 24
1885	Mar. 3	23	437	353		Appeal	20, 30, 33
1891	Mar. 3	26	826	517		Judiciary	32, 36
1892	May 5	27	25	60	6	Chinese Exclusion	14, 25
1895	Jan. 12	28	620	23	5	Pub. Doc.	32
1903	Feb. 11	32	823	544		Expedition Act	25
1911	Mar. 3	36	1087	231		Judiciary	32, 36

IN THE

Supreme Court of the United States

CHARLES L. CRAIG,
Petitioner,

against

WILLIAM C. HECHT, United States Marshal for the Southern District of New York,
Respondent.

BRIEF ON BEHALF OF THE PETITIONER FOR WRIT OF CERTIORARI.

The petition is for certiorari to the Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and send to this Court a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the appeal described in the petition to the end that the said case may be reviewed and determined as provided in sections 240 and 262 of the Judicial Code.

The petitioner, the Comptroller of the City of New York, was charged with contempt of court for certain expressions criticizing the action of District Judge MAYER, now Circuit Judge, in connection with litigations concerning the traction lines in the City of New York, which had been brought in the District Court for the Southern District of New York. The letter is set forth in the petition, pages

5-8, and in the Information (Record, fols. 156-167). It was signed by the petitioner "who was then Comptroller and chief financial officer and a member of the Board of Estimate and Apportionment of the City of New York" (Petition, p. 3) in his official capacity as Comptroller (Petition, pp. 8, 15) , and was "in response to the invitation" of Public Service Commissioner Nixon, who had "called a conference for the purpose of discussing the financial and physical condition of the traction lines in the City of New York, including those involved in the suits and proceedings pending in the District Court, and considering any suggestions that might be made by the conferees with respect to the future of said lines and the relations between them and the City of New York" (Petition, pp. 14, 15). It was further alleged that the petitioner "did cause the said letter to be delivered to the said Public Service Commissioner and to the persons attending the said conference at the said office of said Public Service Commissioner" (Record, fols. 167-168). It was still further alleged that the petitioner "did cause the same to be published in various newspapers" (Record, fol. 168), but, as to the latter, it was shown "that the letter reached the public press through a usual routine of giving out letters for publication which prevailed in the Comptroller's office; that this was done through the Secretary of the Finance Department, who is an appointee of and paid by the City" (Petition, p. 15). The writing was an isolated act, as appears by the Information, and no matter in aggravation was alleged.

An order was made by District Judge MAYER requiring the petitioner to show cause why he should not be declared and adjudged in contempt

of the District Court. The petitioner appeared involuntarily and challenged the jurisdiction of the Court at every stage of the proceeding (Petition, paragraph XXII, p. 19). The petitioner, successively, demurred, and pleaded not guilty, and asked that another judge of the District Court be designated to hear the proceeding, but his requests were overruled by Judge MAYER (Petition, paragraph XXIII, p. 19), who assumed to try the petitioner.

On the hearing the petitioner was a witness in his own behalf. He gave testimony as to his intention and purpose in writing the letter. Commissioner Nixon's letter fixing the time for the proposed conference came to him on the morning of October 6th and was one of the many things he had to attend to on that morning. His letter, in reply, was written in considerable haste, and the writer's purpose was to "get into the mind of Nixon the necessity for that kind of co-operation resulting in the public authorities being on an equal footing with those representing the traction interests" (Petition, paragraph XVI, pp. 15, 16). The petitioner testified further that it was physically impossible for him to have attended the conference on October 6th (*ibid*). The letter itself sets forth that attendance at the conference would require members of the Budget and Finance Committee of the Board of Estimate and Apportionment, of which he was a member, "to drop the preparation of the largest budget in the history of New York City" in which work "they have been for some time past and must continue to be engaged in daily sessions from early to late" (Petition, pp. 5-8); that he did not expect the Commissioner to read the letter at the conference; that the letter was not in-

tended for anyone but the Public Service Commissioner. The petitioner further testified to what he intended by the language employed in the letter; that what he meant by "original sources" was that letters and documents of the railroad companies were kept in their archives, and he meant, by "denying access" to original sources, inability to have "full and unrestricted access with power to compel any subordinate to produce or dig up whatever it might be, or suspected of being, all of the facts that relate to these companies"; "that anything that cut us short of that was a denial of access to the original sources, and that the very purpose of the application that had been made to the United States District Court for the appointment of a co-receiver was to have someone who was in a position to bring about these disclosures; and the necessary effect of the order denying that application was to deny to the municipal authorities in question that kind of access to the original sources" (Petition, paragraph XVI, pp. 15, 16). The petitioner further testified as to how and in what respects it was important to the financial interest of the City of New York, and to its citizens, to have its officials well informed of the matters pertaining to the railroad companies' affairs, and that the most feasible and practicable way to this end was that a co-receiver be appointed, who, in some way, would be representative of the City. The petitioner denied upon oath that he intended to convey the meaning that the District Judge had, in point of fact, denied access to original papers, except insofar as such denial might flow from his refusal to appoint him co-receiver (Petition, paragraph XVI, pp. 15, 16).

The application for the appointment of the

Comptroller was denied on the 22nd day of January, 1919 (Record, fols. 3202-3219).

At the time that the letter was written, October 6, 1919, there was not pending *sub judice* in the District Court, before Judge MAYER or any other judge, awaiting decision, any judicial determination. The subject matter of the petitioner's letter had long before been disposed of (Petition, paragraphs XVII, XVIII, p. 17; Record, fols. 2526-2528); nine months had elapsed between the action of the Court that was criticized and the date of the letter. No renewal of the application for the appointment of a co-receiver had been made, and the receivership had been made permanent (Record, fols. 3202-3219).

Judge MAYER proceeded to "declare your petitioner in contempt of said Court *as charged* in said Information *in respect of* the matters set forth in Paragraphs 1, 2, 3 *and* 4 *of said Information*" (Petition, paragraph XXIV, p. 19; Record, fols. 2512-2516). The paragraphs of the Information referred to are to be found at folios 168-174 of the Record. Judge MAYER signed an order of commitment directing that the petitioner be imprisoned for a term of sixty days, sentence to be executed at the Essex County Jail, Newark, New Jersey, and thereupon the Marshal took the petitioner into custody (Petition, paragraph XXV, page 20).

The petitioner presented to Circuit Judge MANTON a petition for a writ of habeas corpus while in the custody of the Marshal. At that time Judge MANTON was acting under a designation, pursuant to Section 18 of the Judicial Code, appointing him to hold a session of the District Court for the trial of causes and for the hearing and disposing of such *ex parte and other business as might come*

before him. The Petition was presented at *Chambers,* the District Court not being then in session (Petition, paragraph IV, pp. 8, 9; Record, fols. 2649-2658; 2662-2666).

The petitioner averred that he had been deprived of his liberty without due process of law, contrary to the Constitution of the United States and the amendments thereto, in that District Judge MAYER *acted in excess of jurisdiction and in excess of jurisdiction of said District Court held by him in assuming to adjudge the petitioner guilty and to sentence him* (*vide Ex parte Hudgings,* 249 U. S., 378, and other cases cited *infra,* pp. 42, 54).

Circuit Judge MANTON granted the petition and issued the writ of habeas corpus.

The Return to the Writ explicitly set forth that:

> "On October 6th, 1919, there was not pending, awaiting decision, any order or judicial determination mentioned in the letter of that date from the petitioner to Lewis Nixon set forth in the Information, but the same was still within the control of the District Court of the United States for the Southern District of New York and subject to change" (Petition, paragraph XVIII, p. 17; Record, fols. 2526-2528).

Upon the Petition, Return, Denial and Traverse (all of which appear in the Record, fols. 97, 2521, 2554), Circuit Judge MANTON, *at Chambers,* proceeded to determine the facts of the case by hearing testimony and arguments and to dispose of the petitioner as law and justice required (Petition, paragraph IV, pp. 9, 10). Thereupon said Circuit Judge rendered his opinion and decision (*Ex parte Craig,* 274 Fed., 177) holding that the District Court had exceeded its jurisdiction by an excess of

power in assuming to adjudge the petitioner guilty, and made an order discharging the petitioner and directing that the papers in the habeas corpus proceeding be *filed* with the Clerk of the District Court and that the order be *recorded* in said Court (Petition, paragraph V, p. 10; Record, fols. 16-95), thus adopting and following the precise form and procedure of a judge's order that was under consideration by this Court in *Carper* v. *Fitzgerald*, 121 U. S., 87, and other cases cited *infra*, pp. 26, 28.

After the petitioner's discharge in the habeas corpus proceeding, the Marshal presented to one of the Circuit Judges, assignments of error, together with a petition, and thereupon said Circuit Judge allowed an appeal from the order of discharge in the habeas corpus proceedings to the Circuit Court of Appeals for the Second Circuit, and issued a citation (Petition, paragraph VI, p. 11).

The petitioner thereupon applied to the Circuit Court of Appeals, on notice to the Marshal, to vacate and set aside the citation and order allowing the appeal and to dismiss the appeal upon the ground that the Circuit Court of Appeals had not jurisdiction or power to entertain or decide the appeal for the jurisdictional reasons set forth in said motion (Petition, paragraph VII, p. 11), which was thereafter denied (Petition, paragraph II, pp. 3, 4).

After a hearing of the appeal in the Circuit Court of Appeals, that Court (ROGERS and HOUGH, *C. J.*, concurring, LEARNED HAND, *D. J.*, dissenting) reversed the order sustaining the writ of habeas corpus and remanded the petitioner to the custody of the Marshal. A stay has been granted pending this application.

While the appeal was pending in the Circuit Court of Appeals, the petitioner made an application to this Court for a writ of certiorari and/or mandamus, for the reasons and under the circumstances set forth in paragraph II of the Petition. The Solicitor General opposed the application on the ground that it was premature; thereupon that application was refused.

The petitioner sets forth that he has no right to review, by appeal or writ of error, the determination of the Circuit Court of Appeals on the appeal; that the Court determined the appeal without jurisdiction and without any adequate remedy at law to the petitioner of review of its determination, except by writ of certiorari issuing from this Court; and that the proceedings of the Circuit Court of Appeals were without warrant of law (Petition, paragraph X, p. 12).

Grounds of great public importance and urgency are set forth in the petition (paragraph XV, p. 26), and are summarized at the head of Point I, *infra*.

POINT I.

This case and the questions therein are of such public interest and great importance as to warrant the interposition of this Court by certiorari.

The urgent questions that call for the interposition of this Court are:

1. The Circuit Court of Appeals has held that a Circuit Judge has no jurisdictional authority to issue a writ of habeas corpus, notwithstanding its unbroken exercise since the creation of the office of Circuit Judge, and notwithstanding that there has been no express amendment of the Habeas Corpus Act in that respect.

The question involves the jurisdictional authority of thirty-four Circuit Judges and the newly created Circuit Judges, throughout the United States. The present decision confines the issuance of such writs, for practical purposes, to the District Courts and the District Judges. This is discussed under Point II, *infra*.

2. In entertaining jurisdiction of the appeal from the order of Circuit Judge MANTON, there is (a) a disregard of the uniform decisions of this Court that no appeal lies from an order of a Judge (b) a direct conflict of decision, upon the appealability of a Judge's order, with the Circuit Court of Appeals for the Fifth Circuit, which held that a Circuit Court of Appeals had no appellate jurisdiction to review such an order (*Hoskins* v. *Funk*, 239 Fed., 278). In the interest of uniformity of decision it is necessary for this Court to interpose to settle the conflict. This is discussed under Points III and IV, *infra*.

3. The question involves the construction and application of the Constitution of the United States in that the petitioner based his application for a writ of habeas corpus on the claim that he had been deprived of his liberty without due process of law in violation of the fifth amendment of the Constitution of the United States (as in *Re Hudgings,* 249 U. S., 378), inasmuch as the District Court acted in excess of its jurisdiction in assuming to punish the petitioner for contempt when in his act there was no possibility of the "obstruction" of justice. This is discussed under Point V, *infra.*

4. The petitioner is confronted daily, in the discharge of his official duties as chief financial officer of the City of New York with the possibility of an incarceration in the State of New Jersey, beyond the confines of his sphere of office, that would render him *functus officio* for sixty days.

5. The petitioner is prevented from freely exercising his office in safeguarding the financial interests of the City with regard to the traction properties, which are still under control of the Court, lest by word or act of a like or similar kind he be again put in jeopardy of imprisonment.

6. The petitioner is a member of the Charter Revision Commission, which is considering municipal ownership and operation, and this calls for comment on the presently existing judicial control through receivers of such public utilities, and he is embarrassed and circumscribed in the performance of his duties lest legitimate and necessary criticism on such judicial control and operation be regarded as contemptuous, while Circuit Judge MAYER, under designation, is continuing in the management and control of such railways through receivers appointed by him when District Judge.

7. Other reasons of public interest and great importance, even though of less urgency, are set forth in the petition, at pages 20-28, notably that the District Court acted in excess of its powers and beyond its jurisdiction, under the limited powers of a Federal Court to punish for contempt, because the act of which petitioner was held guilty neither "obstructed" nor could possibly obstruct the administration of justice. This is discussed under Point VI, *infra.*

8. The appropriateness of the remedy, by Habeas Corpus is discussed under Point VII, *infra.*

That a certiorari may issue to bring up for review the failure of the Circuit Court of Appeals to dismiss the appeal for lack of jurisdiction in that Court, as also to review the questions of public interest and great importance involved, is clear.

Forsyth v. *Hammond,* 166 U. S., 506;
American Const. Co. v. *Jacksonville Ry. Co.,* 148 U. S., 372;
The Three Friends, 166 U. S., 1;
The Conqueror, 166 U. S., 110;
St. Louis, K. C. & Col. R. R. Co. v. *Wabash Ry. Co.,* 217 U. S., 247;
Hamilton Shoe Co. v. *Wolff Bros.,* 240 U. S., 251;
Smith v. *Vulcan Iron Works,* 165 U. S., 518;
Denver v. *N. Y. Trust Co.,* 229 U. S., 123;
Chicago & N. W. R. R. Co. v. *Osborne,* 146 U. S., 354;
Moran v. *Dillingham,* 174 U. S., 153;
McClellan v. *Carland,* 217 U. S., 268.

This application presents "all the unfortunate possibilities of conflict and collision which might arise" from a further exercise by a municipal officer of the duties of his office in a situation where

the municipality has vast financial interests in local transit properties which are, nevertheless, under the control of a Federal Court. A clash of words has been construed and punished as though it were a clash in acts, and, unless this Court reaches out and defines the legitimate scope of criticism, the municipal officer will not only be imprisoned, but will continue to be repressed in the free exercise of his duties after the term of imprisonment.

We feel that it may be fairly said that the honest expression by an official of his views on a public question within the sphere of his duties is as essentially an official act (*Spalding* v. *Vilas*, 161 U. S., 483) as would be an official order, and that the repression of the one, by the likelihood of recurrent punishment, is a continuing interference with the other.

Moreover, the incarceration of the elected official beyond the confines of his sphere of office would render him *functus officio* for a long period.

In *St. Louis, Kansas City & Colorado Co.* v. *Wabash Railroad Co.* (*supra*), this Court said of a question involving the construction of a decree of a United States Court as related to an entanglement of railway terminal facilities, at page 251:

> "It seems to us that both the private interests of the railroad companies, and of the separate industries and the greater interests of the public call for the granting of the writ of certiorari, and it is, therefore, so ordered."

Doubtless, because of the seriousness and importance of the questions involved, the Court below in its opinion said:

> "If this Court is in error in the conclusion at which the majority of the Court has arrived it is by no means impossible that the Supreme Court can correct any mistake we may have made" (*Record*, fol. 3473).

POINT II.

The Circuit Judge had jurisdictional authority to issue the writ of habeas corpus.

If the circuit judges have not now the jurisdictional authority to issue writs of habeas corpus, it is because their jurisdictional authority, which up to the passage of the Judicial Code indubitably existed, has been lost, not by the deliberately expressed will of Congress, but as an incidental and unintended result of an act which sought merely to merge into the District Courts the Circuit Courts in which the circuit judges served, but which did not in terms deprive them of their power as judges.

Prior to the enactment of the Judicial Code, which merged the courts and vested the powers of the Circuit Courts in the District Courts, the circuit judges, as such, had jurisdictional power to issue the writ of habeas corpus, not only by virtue of the provisions of the Habeas Corpus Act (Statutes of 1867, Chapter 28, 14 Statutes at Large 385, February 5, 1867) but by virtue also of the provisions that when appointed, they were given, in the Circuit for which they were appointed, the "same power and jurisdiction therein as the justice of the Supreme Court allotted to the Circuit" (Act of April 10, 1869).

Clearly, the mere fact that a *court* is merged does not deprive the *judge* whose office still continues, of any jurisdictional power vested in him, *qua* judge. By the Habeas Corpus Act of 1867 the jurisdictional authority to issue the writ was vested in the "several courts of the United States and the several justices and judges of such courts

within their respective jurisdictions," and subsequently, on the appointment of Circuit Judges, by the Act of April 10, 1869, and the still later codification in the Revised Statutes, the jurisdictional authority to issue the writ was vested in "the Supreme Court and the Circuit and District Courts" (R. S., Sec. 751), and upon "the several justices and judges of the said courts" (R. S., Sec. 752), and again by Sections 754, 755, 757, 758, 760, 761, 762, 763 the jurisdictional power of the justices or judges is repeated.

These justices and judges are described in the Revised Statutes as "the several justices and judges of the said courts," but since they were in fact "Justices of the Supreme Court," and "circuit judges" and "district judges" this was but a short way of describing the officers in whom was vested the jurisdictional authority. The statute might as well have read, and, in the ordinary vernacular, would have read, "the Justices of the Supreme Court, the circuit judges and the district judges," or "United States Judge," as in Section 6 of the Chinese Exclusion Act of 1892, or "Judge of the United States" as in Section 1014, Revised Statutes, which would have had the same meaning as the words actually employed.

The object and purpose of the applicable provisions of the Judicial Code were to get rid of superfluous courts, court officers and records, not to circumscribe the jurisdictional power of the judges. That was quite evidently not in the mind of the Congress at all. We undertake to say that if, while the Judicial Code was under consideration in the Senate, a member of that body had risen in his place and asked the Senator in charge of the

bill whether it was intended by the proposed legislation to deprive the circuit judges of the jurisdictional authority which had theretofore been conferred upon them to issue writs of habeas corpus, a negative answer would have unhesitatingly been made.

These views are in harmony with the decision of this court in the case of *Whitney* v. *Dick*, 202 U. S., 132; for there the question was as to whether an additional jurisdictional power had been conferred upon a new court, not whether the judges composing the court had been deprived of any of the jurisdictional powers which they had theretofore exercised.

The jurisdictional powers of the court and the jurisdictional powers of the judge are distinct *U. S.* v. *Clarke*, 1 Gall., 497, 499 (STORY, *J.*). To deprive the judge of his powers should require something more than a conclusion drawn from a drily literal application of language clearly intended to deal only with the courts, *qua* courts.

We feel that it may fairly be said that never in judicial history has a judge lost any of his jurisdictional powers by implication.

In questions of great moment, it had happened in the nation's history, and it will happen again where a person has been restrained of his liberty, that a judge of the District Court has not only felt but expressed his reluctance to interfere with the committing power of another judge of co-ordinate jurisdiction. (In this respect, see the opinion of Judge WALLACE, refusing to discharge a prisoner merely because a judge of co-ordinate jurisdiction had made the commitment, *In re Hale*, 139 Fed., 496, 504). If the opinion of the Court below stands, the district judges will be more loath

than formerly to grant the writ. In such a case a circuit judge who is aloof from a district judge, would doubtless more readily exercise the power, although it were in reality the identical power drawn from the Habeas Corpus Act. The only "other and appropriate sources of judicial power" (*Matter of J. A. Tracy, Petitioner,* 249 U. S., 551) are Justices of the Supreme Court and the Supreme Court, itself, which should be relieved of such applications whenever possible.

The Constitution, Clause 2, Section 9, Article 1, provides that

> "The privilege of the writ of habeas corpus shall not be suspended unless when in cases of rebellion or invasion the public safety may require it."

The First Judiciary Act of September 24, 1789, Statutes at Large, Section 14, provided as follows:

> "Section 14. And be it further enacted, That all the before-mentioned courts of the United States (Supreme Court, Circuit Courts as then constituted and District Courts) shall have power to issue writs of scire facias, habeas corpus and all other writs * * * necessary for the exercise of their respective jurisdiction and agreeable to the principles and usages of law. And that either of the *justices* of the Supreme Court, as well as *judges* of the district courts shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment."

There was then no Circuit Judge; the office was not created until 1869.

Referring to the provisions of the Constitution, and to the Judiciary Act, just quoted, Chief Justice MARSHALL said:

"Acting under the immediate influence of this injunction (of the Constitution), they must have felt, with peculiar force, the obligation of providing efficient means by which this great Constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted.

"It may be worthy of remark that this Act was passed by the first Congress of the United States sitting under a Constitution which had declared 'That the privilege of the writ of habeas corpus should not be suspended unless when, in cases of rebellion or invasion the public safety may require it.'"

Ex parte Bollman, 4 Cranch, 74.

It will be observed that by this Act of 1789 the power to issue such writs was confined with respect to justices and judges, as distinguished from courts, to Justices of the Supreme Court and Judges of the District Court. At that time there were no Circuit Judges *eo nomine.* The Statute of 1789 is important as the first step in the development of the law.

"Chief Justice MARSHAL, in *Bollman's* case, construed this branch [the 14th section] of the Judiciary Act [of 1789] to authorize the courts *as well as the judges* to *issue* the writ."

Ex parte MILLIGAN, 4 Wall, 2, 110.

After the Act of 1789 came:

Statutes of 1833, Chapter 57, Section 7, 4 Statutes at Large, 634:

"And be it further enacted that either of the Justices of the Supreme Court or a Judge of any District Court of the United States in ad-

dition to the authority already conferred by law, shall have the power to grant writs of habeas corpus."

There were not yet any Circuit Judges *eo nomine*. The first statutory provision fully covering habeas corpus, known generally as the Habeas Corpus Act, was Statutes of 1867, Chapter 28, 14 Statutes at Large, 385, February 5, 1867:

> "That the several courts of the United States and the several justices and Judges of such courts within their respective jurisdictions, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the Constitution or of any treaty or law of the United States; and it shall be lawful for such persons so restrained of his or her liberty to apply to either of said Justices or Judges for a writ of habeas corpus * * * said Justice or Judge to whom such application is made shall forthwith award a writ of habeas corpus unless it shall appear from the petition itself that the party is not deprived of his or her liberty in contravention of the Constitution or laws of the United States."

The Statute of 1867 came before this Court for construction in the case of

Ex parte McCardle, 73 U. S., 318, 325.

Chief Justice CHASE, referring to the first section of the Act, said:

> "The first section gives to the several courts of the United States and the several justices and judges of such courts within their respective jurisdictions, in addition to the authority already conferred by law, power to grant writs of habeas corpus in all cases where any person may be restrained of liberty in violation of the

Constitution, or of any treaty or law of the United States.

"This legislation is of the most comprehensive character. It brings within the habeas corpus jurisdiction of every court and of *every judge* every possible case of privation of liberty contrary to the National Constitution, treaties or laws. It is impossible to widen this jurisdiction."

The following language of Justice BREWER in *Whitney* v. *Dick*, 202 U. S., 132, 136, is also significant:

"It is doubtless true that if the language of the Court of Appeals act was fairly susceptible of two constructions, one granting and the other omitting to grant power to issue a writ of *habeas corpus*, the great importance of the writ might justify a construction upholding the grant. This is indicated by the ruling in *Ex parte Bollman*, 4 Cranch, 75. The fourteenth section of the original judiciary act contained this language: 'That all the beforementioned courts of the United States shall have power to issue writs of *scire facias, habeas corpus*, and all other writs, not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.' And the question presented was whether the grant of power to issue a writ of *habeas corpus* was an absolute and independent grant or one simply authorizing the issue of the writ when necessary for and in aid of the exercise of a jurisdiction already otherwise obtained, and it was held to be an absolute and independent grant, the conclusion being placed by Chief Justice MARSHALL, delivering the opinion of the court, partly on the grammatical construction of the section and partly on the significance and importance of the writ itself. But in the Courts of Appeals act there is no mention of *habeas corpus*, no

> language which can be tortured into a grant of power to issue the writ, except in cases where it may be necessary for the exercise of a jurisdiction already existing."

(Certain provisions of the Act of 1867 relating to appeals from the Circuit Court to the Supreme Court of the United States were repealed by the Act of March 27, 1868 (15 Statutes at Large, 44), but such repeal is unimportant to the consideration of the precise point before the Court in the instant case. Moreover, the repealing clause of the Act of 1868 disappeared by the amendment of the Act, March 3, 1885.)

The next act of importance is that of April 10, 1869, entitled "An act to amend the Judicial system of the United States," *providing, for the first time, for the appointment of Circuit Judges.*

Section 1 provided for the increase of the number of Supreme Court Judges to nine.

Section 2 provided as follows:

> "That for each of the nine existing Judicial Circuits there shall be appointed a Circuit Judge who shall reside in his Circuit and shall possess the same power and jurisdiction therein as the Justice of the Supreme Court allotted to the Circuit."

By the terms of this Act there was conferred on Circuit Judges all powers theretofore possessed by Justices of the Supreme Court, including the power to issue writs of habeas corpus. No Circuit Judges having been appointed at the time that the Habeas Corpus Act of 1867 went into effect, the language of that Act: "The several Justices and Judges of such Courts within their respective jurisdictions," did not apply to Circuit Judges at the time of the passage of the Act. But when the Cir-

cuit Judges were appointed by the Act of 1869, quoted above, there was conferred upon them all of the powers of Supreme Court Justices within their respective Circuits and there was equally and coincidentally conferred upon them the power to issue writs of habeas corpus, which always inhered in the office of Supreme Court Justice.

The Circuit Judges received a baptism of power to issue this writ at the moment of their appointment; and this power did not originate in or spring from any Court.

The Act of 1869, providing for the appointment of Circuit Judges, was re-enacted in substance in Section 607 of the Revised Statutes and read as follows:

> "For each circuit there shall be appointed a circuit judge, who shall have the same power and jurisdiction therein as the justice of the Supreme Court, allotted to the circuit * * *. Every circuit judge shall reside within his circuit."

We return now to the main thread of the statutory enactments relating to this subject.

The Habeas Corpus Act of 1867 was transposed into the Revised Statutes of 1873-1874 and became Sections 751 and 752, differing but slightly in phraseology.

It will be observed that the words of the Habeas Corpus Act of 1867, reading as follows:

> "That the several courts of the United States and the several Justices and Judges of such courts within their respective jurisdictions," etc.

were split into two sections by the Revised Statutes of 1873-1874 and became:

> "Section 751. The Supreme Court and the Circuit and District Courts shall have power to issue writs of habeas corpus."

and

> Section 752. The several Justices and Judges of the said Courts, within their respective jurisdictions shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty."

Under familiar canons of construction of Statutes, the revision of the language of the Habeas Corpus Act, without any apparent intention to change its effect, brought about no substantial change in the law, so that the specification of the several courts of the United States as: "the Supreme Court and the Circuit Court and District Courts" meant substantially what it did in the first place in the Habeas Corpus Act of 1867, namely, that the power was conferred upon the "several Justices and Judges of such courts," to wit, the Supreme Court and the District Courts, as expanded by the Act of 1869, appointing Circuit Judges and giving them the same power, within their jurisdiction, as Supreme Court Justices.

There never has been an express change in the Habeas Corpus Act of 1867 except in its revision by the Revised Statutes. The word "Circuit" has been bracketed by compilers to indicate that it has been omitted, in the enumeration of the courts, in various annotated compilations of the laws of the United States, but *has not been physically struck out of the section.* The Habeas Corpus provisions remain exactly as they were.

(For purposes of historical completeness we may make mention, in passing, that on August 29, 1842, there was adopted Chapter CCLVII, known as 5

Statutes at Large, 539, but it is not directly important to the subject in hand. Its terms are limited to "subjects or citizens of a foreign State.")

This Court has shown no tendency to restrict the "appropriate sources of judicial power" to issue the writ.

In the Matter of J. A. Tracy, petitioner, 249 U. S., 551, *per curiam,*

> "For the purpose of redressing assumed violations of the Constitution and laws of the United States *by means* of habeas corpus, the jurisdiction *of other competent courts* to afford relief *may not be passed by* and the original jurisdiction of this Court be invoked in the absence of exceptional conditions justifying such course (*Matters* v. *Ryan,* 249 U. S., 375, *ante*).
>
> "When leave to file the petition for habeas corpus was previously denied, without a suggestion as to the existence of any exceptional condition which would have justified a contrary view, such refusal presumably was based on *the existence of the right to seek, if desired,* other and appropriate sources of relief. From this it follows that although we pass the application of the doctrine that the refusal of habeas corpus is not the thing adjudged, precluding a subsequent granting of such writ upon the same facts, nevertheless there is here no reason to grant the order prayed, since the previous order rested upon *the right and duty to petition for relief, if habeas corpus was desired, to other and appropriate sources of judicial power.*" (Italics ours.)

What are the "other and appropriate sources of judicial power" thus referred to? Are they confined to District Courts and District Court Judges, in view of the broad general grant in the Habeas Corpus Act of power to "the several courts of the

United States and the several Justices and Judges of such Courts"? Or do such sources include Circuit Judges?

What reason has been suggested or can be suggested why Circuit Judges, who, from the time of their creation, possessed, enjoyed and exercised, in numberless cases, the right and duty to issue the writ of habeas corpus, should be stripped of that right? It cannot have resulted from the mere fact that the Circuit Judges sit in a Court of Appeals. The Circuit Judges are just as competent now as they have always been to issue the writ. If they have lost the right, it must have been by indirection.

The question presents three aspects:

1. What was the meaning of the Judiciary Act of 1789, confirmed by the Act of 1833, giving the power to issue the writ to Justices of the Supreme Court and to Judges of the District Courts, as expanded by the Law of 1869 conferring on the newly appointed Circuit Judges the same power and jurisdiction, within their respective jurisdictions, as Justices of the Supreme Court?

2. Is there any doubt that the Habeas Corpus Act of 1867 conferring the right on Justices of the Supreme Court and Judges of the District Courts, was expanded by the Act of 1869 conferring on the Circuit Judges, within their jurisdictions, the same powers as Supreme Court Justices? The Habeas Corpus Act has never been changed in substance; it has been merely codified in the Revised Statutes.

3. Was any repeal of the power of Circuit Court Judges to issue the writ effected by the Judicial Code, merging the Circuit Court into the District Court?

A very material consideration, we submit, is that when Circuit Judges were created no new Court was created—the Circuit Court was already in existence. The Circuit Judges took their places on the bench of the Circuit Court, not by any express designation or direction, but merely as having the same jurisdiction and powers, within their respective areas of jurisdiction, as the Supreme Court Justice allotted to the Circuit. As the Circuit Judges did not derive their origin from a Court, it is hard to see how they could lose any of their powers or jurisdiction, as Judges, by the abolition or merger of the Court in which they mostly sat.

The holding of the lower Court is, in effect, that by the abolition or merger of the Circuit Court, the Circuit Judges were shorn of all of their powers —nothing was left to them except their bare titles —and that they were re-clothed with the power, and only with the power, to sit on the bench of the Circuit Courts of Appeal.

We know that they retained jurisdiction to sit under the Expedition Act (*Ex parte United States,* 226 U. S., 420, 423). Furthermore, they retained jurisdiction to sit under the Chinese Exclusion Act of 1892, § 6: "The designation of the Judge, in general terms, as 'a United States Judge' is an apt and sufficient description of a Judge of a Court of the United States, and is equivalent to or synonymous *with the designation, in other statutes, of the Judges authorized to issue writs of habeas corpus,* or warrants to arrest persons accused of crime" (citing Rev. Stat., §752, 1014; *Fong Yue Ting* v. *United States,* 149 U. S., 698, 728). The Circuit Judges are comprehended within the category of "any Justice or Judge of the United States"

in § 1014 of the Revised States relating to the arrest and holding or bail of persons accused of crime. They also may, without designation, grant injunctions or restraining orders in cases pending in the District Courts of their Circuits (*Judicial Code,* § 264) and upon designation by the President, act as a Judge of the Court of Customs Appeals (*Judicial Code,* § 188). As the Circuit Judges retained these several powers as Judges, under the separate acts conferring them, notwithstanding the abolition or merger of the Circuit Courts by the Judicial Code, how can it be said that they were, by the Judicial Code, shorn of the power conferred by the separate Habeas Corpus Act, unrepealed, to issue the great writ, which they had exercized in numberless instances covering over half a century, of which *Carper* v. *Fitzgerald,* 121 U. S., 87; *McKnight* v. *James,* 155 U. S., 685; *Lambert* v. *Barrett,* 157 U. S., 697; *In re George Macdonnel,* 11 Blatchford, 79; *Ex parte Schmeid,* 1 Dillon, 587; *In re King,* 51 Fed., 434; *Ex parte Davis,* 112 Fed., 139, and *Ex parte Jacobi,* 104 Fed., 681, are instances. How can it be said that, when acting as Circuit Judge, Judge MANTON was acting solely as a Judge of the Circuit Court of Appeals (Opinion of Court below, Record, fol. 3414).

A general act does not repeal a special act, unless the intention clearly appears (*Ex parte United States,* 226 U. S., 420).

Within the necessarily narrow limits of a brief on such an application as this we have confined ourselves to the presentation of the point involved without elaborate argument.

We submit that there is no escape from the proposition that if, by the Judicial Code, the Circuit Judges were stripped of the power to issue

habeas corpus, it was only because they were stripped of all of their powers, and since then have had only such powers and jurisdiction as they were re-clothed with by the Judicial Code.

In this age the tendency of judicial interpretation is to expand rather than contract the capacity and usefulness of Judges. There is certainly need for their utmost activity, and we have been admonished ever since the time of Marshall that it can be no better employed than in giving effect to the Habeas Corpus Act, lest the means failing the writ itself would be lost.

The point of the jurisdiction and power of a Circuit Judge to issue a writ of habeas corpus is necessarily involved, for only by holding that he had no such jurisdiction or power, and that the order was an order of the District Court, did the Circuit Court of Appeals maintain jurisdiction to hear and decide the appeal.

So long as the order discharging the Comptroller remained effective, the capacity in which Judge MANTON had acted, whether as Circuit Judge or under designation to perform the duties of a District Judge, did not appear to be important, and the question seemed to be a moot one.

But now that the Circuit Court of Appeals has based its own jurisdiction to entertain and decide the appeal solely upon the ground that the order is an order of the District Court, and is not an order of a Circuit Judge, because of lack of power in a Circuit Judge to make the same, the whole case hangs on the proper decision of the question whether a Circuit Judge has such power.

POINT III.

The decisions are uniform that no appeal to the Circuit Court of Appeals lay from an order of a Judge; that only an order of a Court might be reviewed by appeal or writ of error.

Carper v. *Fitzgerald,* 121 U. S., 87;
In re Lennon, 150 U. S., 393;
McKnight v. *James,* 155 U. S., 685;
Lambert v. *Barrett,* 157 U. S., 697;
Ex parte Jacobi, 104 Fed., 681;
Harkrader v. *Wadley,* 172 U. S., 148.

It makes no difference, in considering this point, whether the order was that of a Circuit Judge or of a Judge designated to perform the duties of a District Judge—it is still a Judge's order.

The making of a Judge's order in a habeas corpus proceeding is distinctly provided for in the Revised Statutes.

Section 752 provides:

> "The several justices and *judges* of the said Courts within their respective jurisdictions shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty." (Italics ours.) (See also quotation from *Ex parte Milligan, supra,* at page 17).

Section 761 provides:

> "The Court, or Justice or *Judge* shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments and thereupon to *dispose* of the party as law and justice require." (Italics ours.)

It is, therefore, entirely clear that such a proceeding initiated by a writ issued by a judge should be continued before and decided by the judge issuing the same and that there is no provision nor expectation that a proceeding thus initiated shall be turned into a Court proceeding or that the final order shall be a Court order.

Carper v. *Fitzgerald,* 121 U. S., 87, was an appeal from an order of a Circuit Judge discharging a prisoner on a writ of habeas corpus. That was a proceeding before the Circuit Judge at his Chambers in Baltimore, Maryland. The petition was presented to the Judge in Baltimore, who directed the Clerk of the Circuit Court for the Eastern District of Virginia to issue a writ of habeas corpus and make it returnable before him at the United States Court House in Baltimore. The writ was accordingly issued, under the seal of the Court, the usual form of Circuit Court writs, and made returnable

> "before the Honorable HUGH L. BOND, Judge of our Circuit Court of the United States, for the Eastern District of Virginia, sitting at the United States Court House, Baltimore, Maryland."

The record showed that the jailer made his return to the writ, and that the petitioner filed a demurrer thereto, upon consideration of which an order of discharge was entered. At the foot of this order was the following:

> "And it is ordered that the papers in this case be filed in the Circuit Court of the United States at Richmond, Virginia, and that this order be recorded in said Court.—HUGH L. BOND, Circuit Judge."

From that order the jailer was allowed an appeal to this Court by the Circuit Judge, and the case was docketed in this Court as "An appeal from the Circuit Court of the United States for the Eastern District of Virginia," but this Court refused to regard it as such.

Mr. Chief Justice WAITE delivered the opinion of the Court (page 89), as follows:

> "The form of the docket entry here does not change the character of the proceeding from which the appeal was taken, and that was clearly under Section 752 of the Revised Statutes, before the Judge sitting as a Judge, and not as a Court. The Act of March 3, 1885, C. 353, 23 Stat., 437, gives an appeal to this Court in habeas corpus cases only from the final decision of a circuit court.
>
> "The order of the judge that the papers be filed, and his order recorded in the circuit court, does not make his decision as judge a decision of the court. Neither does our Rule 34, 117 U. S., 708, adopted at the last term, have that effect. The purpose of that rule was to regulate proceedings on appeals under section 763, from the decision of a judge to the circuit court of the district, as well as under section 764, as amended by the Act of March 3, 1885, from a circuit court to this court. Power to make such a regulation was given to this court by section 765 of the Revised Statutes."

The procedure and practice followed in the instant case was exactly that adopted by Judge BOND in the case referred to, except that Judge MANTON directed the order to be filed in the office of the Clerk of the District Court (the office of Clerk of the Circuit Court having been abolished) and the Clerk of the Circuit Court of Appeals having, mani-

festly, nothing to do with the safe keeping of such an order. Judge MANTON'S decision directed that the papers be "filed" in the office of the Clerk of the District Court and that it be "recorded" in said Court—the words "filed" and "recorded" being the exact ones used in *Carper* v. *Fitzgerald*.

In the instant case the Court gave an entirely different significance to the use of those words saying, in the opinion of ROGERS, *C. J.*:

> "Whatever doubt one might otherwise entertain as to the capacity in which he was acting at the time seems to be put at rest by the order which he made and which required 'that the papers in this proceeding be filed with the Clerk of the United States District Court for the Southern District of New York and that they be recorded in said court.' As a Judge of the Circuit Court of Appeals he would not have directed the papers to be filed with the Clerk of the District Court and that they be recorded in that Court, but would have filed them in the office of the Clerk of his own court and ordered them to be there recorded." (Record, fols. 3421-3423.)

In the first place the Judge was not acting as a "Judge of the Circuit Court of Appeals," but as a Circuit Judge, and for that reason it would have been manifestly improper to direct that the papers be filed in the office of the Clerk of the appellate court. Nor does a Circuit Judge function only as a judge of the Circuit Court of Appeals. As there is no longer a distinct Circuit Court nor a Clerk of a Circuit Court, there was no place to file or record them in other than the office of the Clerk of the District Court, now fulfilling the functions of successor. The office of the Clerk of the District Court has not been limited to receiv-

ing, for record, the papers in actions and proceedings pending in the Court (see 28 Stat. at L. 619-20, subdiv. 5; Copyright Law of 1831, 4 Stat. at L. 437, Section 4, Act of February 3, 1831, C. XVI).

No mention is made of the decision of this Court in *Carper* v. *Fitzgerald* (*supra*) in the opinion of the Circuit Court of Appeals, nor of any of the other cases at the head of this point, all of which were pressed on the attention of the Court. They were either passed by or completely misapprehended.

Neither the filing of the order nor the recording of it changed its character from that of a Judge's order, as we have seen by the case last cited.

It is proper to note in passing, that the Act known as the Habeas Corpus Act referred to in the foregoing opinion of *Carper* v. *Fitzgerald,* has never been repealed or expressly amended in its phraseology with respect to any matter now under consideration. The annotators of the Statutes have, however, assumed from time to time to excise from or interpolate in several editions of the Revised Statutes, embracing the Habeas Corpus Act, such words as they deemed appropriate to the changes wrought by the Acts of 1891 and 1911, especially relating to the abolition of the Circuit Court.

It is noteworthy in considering the direction and effect of the case last cited that it was an appeal from an order discharging a prisoner on a writ of habeas corpus, as in the instant case, and that it was a proceeding before a Circuit Judge at his Chambers, as in the instant case.

It is also noteworthy that that decision was arrived at notwithstanding the rule of this Court which appeared to recognize that an appeal would lie *in some cases* or under *some* circumstances from the final decision of a judge, as well as from the

final decision of a Court, discharging the writ or discharging the prisoner, as the case might be. The point of the decision was that it would not lie from an order of a Circuit Judge.

If it be urged that a Judge's order is not, or ought not to be, beyond judicial review, a ready answer may be found in pointing out that such an order may be reviewed by writ of certiorari issuing from this Court. The special office of such a writ of certiorari is to redress excesses of jurisdiction by a Judge (*Whitney* v. *Dick*, 202 U. S., 132).

In *McKnight* v. *James*, 155 U. S., 685, a proceeding was begun by a petition in habeas corpus to the Circuit Court of Franklin County, Ohio, setting forth that the petitioner McKnight was unlawfully deprived of his liberty in the Ohio penitentiary.

Under this petition a writ of habeas corpus was granted by a Judge of the Circuit Court of Ohio, Second Judicial Circuit, and the petitioner was ordered to be produced before him in Columbus. The case was heard upon the pleadings and testimony by the Circuit Court Judge sitting in Chambers, and an order made that McKnight be remanded to the custody of the warden. Whereupon the petitioner sued out this writ of error directed to the Judge by name.

After referring to the Revised Statutes, Section 709, the Court, Mr. Justice BROWN writing (at page 687), said:

> "We held, however, in *Carper* v. *Fitzgerald*, 121 U. S., 87, that an appeal did not lie to this Court from an order of a circuit judge of the United States, sitting as a judge and not as a court, discharging a prisoner brought before him on a writ of habeas corpus, for the reason that the Act of March 3, 1885 (C. 353,

> 23 Stat., 437) gave an appeal to this Court in habeas corpus cases only from the final decision of a Circuit *Court;* and that Rule 34 did not make his decision as judge a decision of the *court,* the purpose of that rule being to regulate appeals to the Circuit Court from the final decision of any court, justice or judge inferior to that court, as well as appeals from the final decision of such Circuit Court to the Supreme Court." (Italics ours.)

Had the lawmakers, confronted as they were by the decision in *Carper* v. *Fitzgerald,* intended to confer jurisdiction upon the Circuit Court of Appeals to review an order of a Circuit Judge in habeas corpus, they would have said so in terms or effect by readopting, in appropriate form, the provisions of Sections 763 and 764, or have embodied them in Sections 128 and 238 of the Judicial Code, instead of making the two sections last cited the exclusive confines of appellate jurisdiction (*Cross* v. *Burke,* 146 U. S., 82).

Not only is there no longer a Circuit Court before whom an order of inferior Judge may be reviewed, but the Statute (Sec. 763, R. S.) was not amended so as to change the title of the Court therein specified to that of the Circuit Court of Appeals. The language of Section 763 remains bare and unchanged in phraseology, though deprived of force (*In re Lennon,* 150 U. S., 393; *Cross* v. *Burke, supra*).

In the case of *Lambert* v. *Barrett,* 157 U. S., 697, Theodore Lambert "presented to one of the Judges of the Circuit Court of the United States for the Third Circuit at Chambers on December 28, 1894, his petition for habeas corpus."

The Circuit Judge to whom the petition was presented, upon consideration thereof and the matters

therein set forth, refused to issue the writ; whereupon an appeal from the order denying the application was allowed, but was dismissed by this Court, Mr. Chief Justice FULLER saying:

> "Moreover, the order from which the appeal was taken was not a final decision of the Circuit Court of the United States for the District of New Jersey, but was an order of the Circuit Judge at Chambers, and an appeal from such an order will not lie."

In *Harkrader* v. *Wadley,* 172 U. S., 148, 162, this Court, by Mr. Justice SHIRAS, said:

> "It is, indeed, true, as was decided in *Carper* v. *Fitzgerald,* 121 U. S., 87, that no appeal lies to this Court from an order of a circuit judge of the United States, and not as a court, discharging the prisoner brought before him on a writ of habeas corpus. But this record discloses that, while the original order was made at Chambers, the final order, overruling the return of the sheriff and discharging the prisoner from custody, was the decision of the circuit court at a stated term, and therefore the case falls within *In re Palliser,* 136 U. S., 257, 262."

The very basis of the appeal in the instant case was that it was an order of a Circuit Judge (Vide Assignments of Error, Record, fol. 5).

The assignment of errors referred to the order appealed from as an order of the Circuit Judge. The order was neither referred to in the assignment of errors as an order of the District Court, nor any error assigned presenting the order for review as an order of the District Court. The Court below, in treating and holding the order as an order of the District Court to maintain its foothold of jurisdiction and reversing it as such, proceeded

without any assignment of error raising any such point.

The statute confers no power on the Circuit Court of Appeals to review the action of a Circuit Judge.

If it be granted for the sake of the argument, that the order is the order of a Circuit Judge, regardless of his designation to perform the acts of a District Judge, and that he had no power as a Circuit Judge to issue a writ of habeas corpus, the Circuit Court of Appeals had no authority whatever to review the order or decision of a Circuit Judge.

The distribution of the appellate jurisdiction of the United States Courts and the purposes that were intended to be accomplished by sections 128 and 238 of the Judicial Code, namely, to closely confine the jurisdiction of the Circuit Court of Appeals and to closely limit appeals to the Supreme Court, respectively, need not be dilated upon (*McLish* v. *Roff*, 141 U. S., 661).

When Congress by the Act of 1891, in part, and wholly in 1911, set up the new appellate court, it did not attempt to strip the circuit judges of all of their powers except to sit upon the bench of the appellate court and to be designated to sit in an inferior court; it contented itself by abolishing the Circuit Court and by specifying that the Circuit Judges who sit in the Court of Appeals might be designated to sit also in the District Court.

If it be argued that Congress overlooked the possible exercise of the power by a Circuit Judge after the creation of the Circuit Court of Appeals, such an oversight cannot, by any stretch of argument, create or imply jurisdiction to review its exercise by a Court of Appeals not expressly authorized so to do.

It is axiomatic that the jurisdiction of the Circuit Court of Appeals is purely statutory. The definition by BAKER, *Circuit Judge,* of the jurisdiction of a trial Court of the United States is appropriate as well to a Circuit Court of Appeals: "A court sharply restricted both as to persons and subject matters."

These cases go upon the ground that the sole jurisdiction conferred on the appellate courts is to review the final orders of courts below by appeal or writ of error, no jurisdiction having been conferred to review a judge's order. One reason for that, and perhaps the most applicable one, is that there is no finality in form or substance to a judge's order. In habeas corpus the discharge does not reverse the conviction, which still remains, if not utterly void as in excess of jurisdiction. Another reason doubtless is that, in rare cases of apparent abuse of power by a judge, this Court could exercise its ample jurisdiction to review by certiorari.

POINT IV.

There is a direct conflict between the Circuit Courts of Appeal for the Second and Fifth Circuits upon the appealability of the order of a Judge.

The Circuit Court of Appeals in the instant case held that: "The order sustaining the writ and ordering the discharge of Craig, and which the Judge ordered recorded in the District Court, and which is the order appealed from must be regarded as made by him under his designation to hold the District Court for the Southern District of New York and as such an appeal from that order was

properly taken to this Court." (Opinion Rogers, *C. J.* (fol. 3423), concurred in by Hough, *C. J.*, (*Record,* fol. 3479). But the order followed precisely the formula laid down in *Carper* v. *Fitzgerald,* 121 U. S., 87, in which the order was held "the order of the Judge," not "a decision" or order "of the Court" in which the papers were filed or over which the Judge presided.

The Court below in the instant case reached its conclusion, notwithstanding that the designation embraced also "the hearing and disposition of such *ex parte* and other business as may come before him during said period" (Record, fol. 2604) and notwithstanding that the writ was granted in Chambers, the District Court not being then in session and that the hearing was had in Chambers (fols. 2649-2658, 2662-2666).

By treating the order as an order of the Court instead of as an order of a Judge, the Circuit Court of Appeals ignored in its opinion the effect of the holding in *Hoskins* v. *Funk,* 239 Fed. Rep., 278, by the Circuit Court of Appeals for the Fifth Circuit, that a Circuit Court of Appeals had no jurisdiction to review an order of a *Judge,* although that case was pressed upon the attention of the Court below.

The conflict exists, nevertheless, between the decisions in the two Circuit Courts of Appeal and furnishes indubitable ground for the issuance of a writ of certiorari as prayed for.

POINT V.

This Court had exclusive jurisdiction, by direct appeal, to review the order discharging the petitioner, which was based upon a finding that the petitioner had been deprived of his liberty by an excess of power, involving the construction and application of the Constitution of the United States. The assumption of jurisdiction by the Circuit Court of Appeals warrants and requires the intervention of this Court, by *certiorari*.

The petitioner claimed that he had been deprived of his liberty without due process of law because, in the contempt proceedings the Court had proceeded without any foundation of jurisdiction, and in excess of its powers, being limited by the narrow terms of a Federal Statute to punish acts tending to obstruct the administration of justice in a pending cause, when in fact there was no matter pending calling for judicial determination, nothing *sub judice*.

The petition for writ of habeas corpus set forth (Record, fol. 126):

> "Your petitioner further alleges that said order and commitment were and are void and were made without any jurisdiction in the Court or the said Judge to make, file or enter the same and that your petitioner is being deprived of his liberty without any lawful warrant or authority whatsoever and without due process of law and, since being taken into custody by said Marshal, as aforesaid, has been continuously so deprived of his liberty, in violation of the Constitution of the United States, and especially the Fifth Article of the amend-

ments thereof, and in violation of the laws of the United States."

The return set forth (Record, fols. 2526-2628):

> "Still insisting that your Honor is without authority to issue a writ of habeas corpus and that the petition for the writ herein is insufficient in law, and without waiver thereof, this respondent says: On October 6, 1919, there was not pending awaiting decision any order or judicial determination mentioned in the letter of that date from the petitioner to Lewis Nixon, set forth in the information, but the same was still within the control of the District Court of the United States for the Southern District of New York and subject to change."

Judge MANTON in his opinion devoted himself principally to the point of absence of jurisdiction and the consequent excess of power, citing *Ex parte Hudgings*, 249 U. S., 378; *Ex parte Royall*, 117 U.S., 241; *Ex parte Lange*, 85 U. S. (18 Wall), 163; *New York* v. *Eno*, 155 U. S., 89; *In re Loney*, 134 U. S., 372; *Ex parte Siebold*, 100 U. S., 371; *Ex parte Parks*, 93 U. S., 18.

The construction or application of the Federal Constitution was thus involved. This Court, therefore, had exclusive jurisdiction of any appeal.

Judicial Code, Sec. 238;
Raton Waterworks Co. v. *City of Raton*, 149 U. S., 552;
Union & Planters Bank v. *City of Memphis*, 189 U. S., 71;
Carolina Glass Co. v. *State of South Carolina*, 240 U. S., 305, 318;
Horn v. *Mitchell*, 243 U. S., 247;
Greene v. *Louisville & I. R. R. Co.*, 244 U. S., 499;

Pierce v. *Creecy*, 210 U. S., 387;
Horner v. *United States* (1892), 143 U. S., 207;
Collins v. *Board of Control*, 219 Fed., 885;
W. S. Tyler v. *Ludlow-Sayler Wire Co.*, 212 Fed., 156;
Grammer v. *Fenton* (C. C. A., Eighth Circuit), 268 Fed., 943.

POINT VI.

The District Court acted in excess of its powers and beyond its jurisdiction, under the limited powers of a Federal Court, to punish for contempt, because the act for which petitioner was held guilty neither "obstructed" nor could possibly obstruct the administration of justice.

The letter was written nine months after the action of the Court which it criticized (Record, fols. 2199 and 3219).

It did not relate to any pending or imminent judicial act It related only to a possible *conference* of State and Municipal officials with the representatives of the railways. There was no intimidation, no threat and no consequence intimated except a failure of the proposed conference. If there was any obstruction it was of the conference, not of the Court.

The proceeding against the petitioner was brought under the Judicial Code, Section 268, the pertinent provision of which is as follows:

> "The said courts (United States Courts) shall have power * * * to punish, by fine or

> imprisonment, at the discretion of the Court, contempts of their authority: *Provided,* That such power to punish contempts shall not be construed to extend to any cases except the *misbehavior* of any person in their presence, *or so near thereto* as to obstruct the administration of justice. * * *" (Italics ours.)

Under this provision there must exist (a) "misbehavior" and (b) an act "to obstruct the administration of justice."

> "An obstruction to the performance of judicial duty resulting from an act done in the presence of the Court is the characteristic upon which the power to punish for contempt must rest."
>
> *Ex parte Hudgings,* 249 U. S., 378, 383;
> See also *Patterson* v. *Colorado,* 205 U. S., 454;
> *Toledo Newspaper Co.* v. *United States,* 247 U. S., 402.

The Circuit Court of Appeals in considering the subject matter of contempt in its opinion cited and relied upon the common law rule as laid down in the old cases. Judge ROGERS quoted from *Ex parte Robinson,* 19 Wall., 505, 510, as follows (*Record,* fols. 3464-3465):

> "The moment the Courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power."

But he omitted the most significant part of the paragraph from which the quotation was made, the next sentence, viz.:

> "But the power has been limited and defined by the Act of Congress of March 2, 1831."

The learned counsel for the government had made the same omission in quotation and we had called attention to the omission in our printed brief before the Court.

(a) *"Misbehavior"*: The word in the Act of 1831 (which has been re-enacted without change as Section 268 of the Judicial Code), and upon which the entire jurisdiction of the Court depends, is *"Misbehavior."* The word *"misbehavior,"* as conferring summary jurisdiction, is out of joint, sense or rational connection, utterly so, with any official act on the part of a public officer like the Comptroller of The City of New York, who, mistakenly or otherwise, is pursuing a course that relates to the subject-matter of his office and duties and is within his jurisdiction. In other words, misbehavior, however broadly construed, does not mean the wrong or wrongful exercise, or attempted exercise, of functions within the jurisdiction of the officer charged. Such acts are privileged (*Spalding* v. *Vilas,* 161 U. S., 483; *DeArnaud* v. *Ainsworth,* 24 App. D. C., 167; 5 L. R. A. [N. S.], 163; *Farr* v. *Valentine,* 38 App. D. C., 413; *Chatterton* v. *Secretary of State for India,* 2 Q. B. [1895] 189; *Dawkins* v. *Paulet,* L. R., 5 Q. B., 94; *Beatson* v. *Skene,* 5 Hurl & Nor., [Excheq.] 838). It should be recalled that the letter was, and was alleged to be (Record, fols. 2199, 156, 2192) "in response to the invitation" of one official to another (fols. 155-156), and that when Mr. Nixon had suggested the conference, counsel for the receiver had conferred with Judge MAYER and asked him whether they should attend it and carry out some important suggestions (Record, fols. 1112-1113). The statute does not mean that he, by intemperate words or expressions, has transcended the

bounds of official etiquette. In other words, *"misbehavior"* as used in the statute means the physical or oral act of some person who is misbehaving in the ordinary sense of the word.

(b) There was no *"obstruction,"* because there was "No Pending Judicial Determination" and none was imminent. Even though the Court be of opinion that the letter of October 6, 1919, was not absolutely privileged, as we contend it was, we submit that under the cases cited, *supra,* the letter did not tend to affect the administration of justice in a matter pending before the Court or Judge, in that it could not possibly influence any decision, for none was pending or imminent. The orders, policy and refusal had been made and taken nine months prior to the letter and were so far in the background that even an unprivileged, hostile communication thereon could not impinge on the statute, Sec. 268 of the Judicial Code, so as to give the Court jurisdiction to entertain contempt proceedings against the author on the ground that the act was misbehavior which tended to "obstruct the administration of justice." The Court's action was completed in respect of the matters which had occupied its deliberations and, being completed, the criticism of it followed, lawfully.

No act of obstruction was specified or defined in the Information or found by the conviction.

The Information set forth four respects in which it was alleged that the letter was *false,* numbered definitely 1, 2, 3 and 4.

The conviction was for "contempt of this Court *in respect of* the matters set forth in paragraphs 1, 2, 3 and 4 of the Information" (Record, fols. 2512-2516).

We submit that the legal meaning of the conviction was that the petitioner was guilty of making four false statements respecting acts of the Court, long past, nothing more. "In respect of" means in common parlance "for" or "only for."

The general conclusion that he was guilty of contempt of court in respect of those acts added nothing to the alleged offense which was simply that he had written falsely of the Court's past acts. No connection is disclosed between the alleged falsehoods and any matter then pending or imminent.

It is impossible to find any connection between the falsehoods as to the past and any present or future act of the Court, or any discernible obstruction or tendency to obstruct.

The Comptroller was held guilty of telling falsehoods out of Court. In the *Hudgings* case, *supra*, the defendant was found guilty of telling falsehoods in Court. In each instance the falsehoods lacked an obstructive characteristic.

It is not enough, we submit, to deprive the citizen of his liberty that such falsehoods were believed by Judge MAYER to have a possible or even an actual obstructive effect. The obstructive effect must really exist. "The *presence* of that element must *clearly be shown* in every case where the power to punish for contempt is exerted," as was said in the *Hudgings* case, *supra*.

Application had been made under express direction of the Board of Estimate and Apportionment for the appointment of a co-receiver in behalf of the City of New York in the railway controversy. That application had been denied and disposed of on the 22d day of January, 1919 (fol. 3219), long before the letter of October 6, 1919, was written. The Court had intimated that it might be renewed

(fols. 139-141); but it had not been renewed, and the receivership had been made permanent (fols. 3202-3219).

It is not claimed that any determination was pending or imminent.

The return to the writ of habeas corpus has settled this for all time. From paragraph Fourth of the Return, we quote (fols. 2526-2527):

> "On October 6, 1919, there was not pending awaiting decision any order or judicial determination mentioned in the letter of that date from the petitioner to Lewis Nixon set forth in the Information, but the same was still within the control of the District Court of the United States for the Southern District of New York and subject to change."

We submit that, if it were possible under the system of pleading in a habeas corpus proceeding, the petitioner might have been discharged upon that admission in the return, standing alone.

Of course, the whole railroad situation was before Judge MAYER, but it was before him wholly in an administrative capacity; "there was not pending awaiting decision any order or judicial determination" in the language of the return.

The situation before him had none of the aspects of a judicial matter at all. It was a receivership conducted by the arm of the Court. We emphasize that it was only within the control of the Court and subject to change *if* the Court *were moved thereto* by some person. We know of no ambulatory jurisdiction of a Court, that would allow the Court to change its decisions or orders without being moved thereto by a party in interest.

As to what constitutes a subject-matter pending *sub judice*.

In the case of *Metzler* v. *Gounod,* Law Times Reports, Vol. XXX N. S., 264, Court of Common Pleas, before KEATING, BRETT and DENMAN, *JJ.*, there was a motion for a rule to show cause why an attachment should not issue against Mrs. Georgina Weldon for contempt of Court for circulating at a concert printed statements which were said to give a grossly unfair statement of the facts at a trial "at variance with those which had been sworn to." The trial had taken place, but the defendant had leave to move for a non-suit or new trial on technical grounds. It appears by the report of the case that during the argument Judge KEATING asked the following suggestive question:

> "Is not this contingent contempt? There was no trial pending."

In delivering the opinion of the Court, KEATING, *J.*, said:

> "I think there is no ground whatever for this application. It is, of course, most desirable and necessary that nothing should be done to prevent a fair trial being had when parties are once before the Court and the decision of the disputed question is still pending. The Court should be protected against any bias being created by proceedings outside, which might prejudice the litigants who are availing themselves of its process. But there is nothing of the sort here. The trial had taken place and the plaintiff had obtained a verdict and the defendant had leave to move for a non-suit or a new trial on technical grounds. The motion may or may not be made; the time has not expired; but it does not matter whether it is made or not, nothing is now pending before the Court," etc.

We know of no right in a Court to have its decree and orders subject to change without being moved

thereto by a party, and such a move by a party is what the Comptroller intended to accomplish by his letter. He intended to move *the parties thereto* to bring about some change. This cannot be made too clear. He intended to make no impression upon Judge MAYER.

He testified that that was his position (Record, fols. 1818-1824); and that the disclosure of the letter, before the newspaper men got hold of it, was furthest from his mind. Quoting his testimony on this point, we find:

> "The last thing on earth that had ever entered my head was that Mr. Nixon would be so foolish as to read that letter to the railroad attorneys that he had to negotiate with" (Record, fol. 1818).

Regardless of his testimony the letter shows upon its face that his intention was that "As a first and preliminary evidence of good faith, *those who desire* such a conference and a reasonable solution of existing complications, *should procure* the entry of orders by Judge MAYER putting the City of New York on an equal footing with the private interests active in the receiverships" (Record, fol. 2208). That shows distinctly that the impression he intended to make was upon the representatives of the railways, through Mr. Nixon, if the latter were to agree with him.

In the case of *Patterson* v. *Colorado,* 205 U. S., 454, Mr. Justice HOLMES, in delivering the opinion of the Court, said at page 463:

> "When a case is finished, the courts are subject to the same criticism as other people, but the propriety and necessity of preventing interference with the course of justice by premature

statement, argument or intimidation hardly can be denied."

The import of the statute is defined in the statement of its purpose in the opinion of Chief Justice WHITE in the *Toledo* case, 247 U. S., pp. 402, 419, where he said:

> "The provision, therefore, conformably to the whole history of the country, not minimizing the constitutional limitations nor restricting or qualifying the powers granted by necessary implication, recognized and sanctioned the existence of the right of self-preservation, that is, the power to restrain acts *tending to obstruct and prevent the untrammeled and unprejudiced exercise of the judicial power* given by summarily treating such acts as a contempt and punishing accordingly. *The test, therefore, is the character of the act done and its direct tendency to prevent and obstruct the discharge of judicial duty—a conclusion which necessarily sustains the view of the statute taken by the courts below* * * *." (Italics ours.)

The view taken by the lower courts in the *Toledo* case may be summarized as follows:

In *Toledo Newspaper Co.* v. *United States*, 237 Fed. Rep., 986, 990 (C. C. A.), Judge DENISON said:

> "Upon this record, the publications had reference to *pending judicial action*, and there is a finding of fact ('as alleged in the information') that they tended and were intended to provoke public resistance to an injunctional order, *if one should be made*, and there is a finding that they constituted an attempt to intimidate—*at least unduly to influence*—the District Judge *with reference to his decision in the matter pending before him.*" (Italics ours.)

The above quotation from the opinion of Judge DENISON is cited with approval in the opinion of Chief Justice WHITE in the *Toledo* case in this Court, 247 U. S., 402, at page 415.

In the same case in the District Court, *United States* v. *Toledo Newspaper Co.,* 220 Fed. Rep., 458, 489, 501, Judge KILLITS said, at page 503:

> "Unless a publication plainly tends to affect the administration of a pending case, our conception of section 268 requires that it be not considered a *misbehavior,* no matter how aggravating or unfair it may be."

A close study of the record in that case shows that: There were three matters then pending before Judge KILLITS awaiting decision, each unrelated, and they were as follows:

(a) An injunction had been applied for and had not yet been granted, Judge KILLITS announcing from the bench that he would have to consider whether the Court had jurisdiction to issue the injunction.

(b) As soon as that happened, this being a big railroad fight and the question being whether the rate of fare should be three or five cents, one Quinlivan started to harangue the people on the afternoon of the day of Judge KILLITS' announcement and advised them that they should not pay any fares but ride on the cars free. In fact they did so. Judge KILLITS forthwith issued an attachment for him to show cause why he should not be punished for contempt. So that matter was a pending matter.

(c) As soon as the attachment was issued, the newspaper started a great hubbub about Quinlivan

and the Judge, and what was going to happen. As soon as that occurred, the Judge issued an attachment against Howard, the managing editor. So that was pending.

(d) With those *three proceedings pending* in the Court *sub judice,* the most violent attack of all came, and it was because of these attacks made upon him, while those three matters were under consideration, that Judge KILLITS came to the conclusion above noted.

The Circuit Court of Appeals, in its opinion, referring to this phase (237 Fed. Rep., at p. 988), said:

> "It is undisputed that the newspaper publications had reference to the general subject-matter, *some phases of which were then pending in the District Court,* and had reference to the making and effect of the injunctional order, *the application for which was then pending.* * * * There was ample jurisdiction to justify punishing any contempt committed at this stage of the case." (Italics ours.)

It follows that, in order to give jurisdiction there must be an impact, physical or verbal, which tends to obstruct the delivery of justice.

There must be a verbal or physical obstruction placed in the way of the Judge to actually prevent him from delivering or to influence him in delivering justice. Hence, when we come to apply the above principles of law to the case at bar, we find that the letter of the defendant dated October 6, 1919, signed by him in his official capacity as "Comptroller," and "in response to the invitation" (Record, fols. 155-156), set out in full in the Information, refers in its own plain terms, in every in-

stance specified, *to past action taken by District Judge* MAYER *in regard to matters which had arisen in the suits and proceedings in the Court.* The letter does not concern itself, on its face, with any pending matter in such suits or proceedings. It is true that the letter does say that "as a first and preliminary evidence of good faith, *those who desire* such a *conference* and a reasonable solution of existing complications, *should procure* the entry of orders by Judge MAYER putting The City of New York on an equal footing with the private interests active in the receiverships" (Record, fol. 2208). That, however, was a condition precedent to official, not judicial, action; it related to a possible conference of non-judicial officials, not to any pending or imminent decision by the Court. The conviction fails to predicate guilt upon that specific statement, but on the contrary confines the contempt to the alleged false statements "in paragraphs 1, 2, 3 and 4."

The Information does state that two suits and a proceeding are, and, during all the times thereinafter mentioned subsequent to the respective dates of their commencement, as thereinafter stated, had been pending in the District Court of the United States for the Southern District of New York. But nowhere in the Information is it alleged or stated that, at the time when it is charged that the defendant Comptroller wrote the letter to Lewis Nixon, Public Service Commissioner, there was pending before the District Court for deliberation or determination by Judge MAYER any motion or proceeding of any kind in either of the suits or proceedings, and the Return to the writ expressly admits that none such was pending. The abortive effort, by the voluminous court records (Record,

fols. 2667-3383), to give the semblance of a pending determination accentuates its absence. All of the opinions and acts set out in the Information were, at the time the defendant Comptroller wrote the letter, past acts, as to which the publication of the letter *could not constitute misbehavior tending to obstruct the administration of justice* within the purview of section 268 of the Judicial Code, "no matter how aggravating or unfair it (the letter) may be," to use the phrase of Judge KILLITS (quoted *supra*). It is a matter of no consequence that the Information characterizes the letter as false, and as having been written wilfully, knowingly, unlawfully and contemptuously, because there was no obstruction to the actual delivery of justice.

The *"misbehavior"* must be near the Court, not necessarily physically near in point of distance, but near in the sense that the *"misbehavior"* presents an interruption which comes between the Court and the consideration of the subject-matter then under submission, in such sort or way as to distract the mind of the Court off of, from or away from, the matter immediately under judicial consideration; or, even to divide the attention of the Court between what it ought or intended to be thinking about and deciding, and the fret or distraction occasioned by the *"misbehavior"* and the incident interruption.

As was said by Judge HAND in his dissenting opinion below: "In the somewhat analogous case of obstructing the draft, the Supreme Court laid down the rule that the words must constitute 'clear and present danger' that the evil will result," citing *Schenck* v. *United States,* 249 U. S., 47, 52 (Record, fol. 3513).

Because, therefore, of the limited effect of the facts appearing on the face of the Information itself, as adjudged in the conviction, as well, also, of the express admission in the Return, the Court, having no general jurisdiction to punish for contempt but only a limited power to punish for obstruction, acted in excess of its powers, and the proper relief was by habeas corpus, as appears in the next point.

POINT VII.

Habeas Corpus was the proper and effective remedy for excess of power or lack of jurisdiction in the commitment for asserted contempt.

Ex parte Hudgings, 249 U. S., 378:
In re Watts, 190 U. S., 1;
Cuyler v. *Atlantic & N. C. R. Co.* (*in re Daniels*), 131 Fed., 95;
In re Reese, 98 Fed., 984;
Ex parte Dock Bridges, 2 Woods, 428;
Ex parte Lange, 18 Wall, 163;
Ex parte Siebold, 100 U. S., 371;
Ex parte Fisk, 113 U. S., 713;
In re Ayers, 123 U. S., 443;
Hans Nielsen, Petitioner, 131 U. S., 176;
Cuddy, Petitioner, 131 U. S., 280, 283;
In re Mayfield, 141 U. S., 107;
Frank v. *Mangum,* 237 U. S., 308;
Ex parte Robinson, 144 Fed., 835.

A single Judge of a lower court has the same power as the Supreme Court to issue a writ of habeas corpus (R. S., Sects. 751, 752), to "proceed

in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require" (R. S., Sec. 761).

Ex parte Milligan, 4 Wall., 2, 110.

"And although it may appear unseemly that a prisoner after conviction * * * should be set at liberty by a single Judge on habeas corpus, there seems to be no escape from the law." Circuit Judge BRADLEY in *Ex parte Dock Bridges,* 2 Woods, 428, 432; referred to with approval in *Ex parte Royall,* 117 U. S., 241, at page 253.

There has been no change in the law in that respect.

That the Congress has liberalized the common law procedure on habeas corpus is frequently overlooked by Courts and counsel. In the instant case the Court below cited and quoted from a number of cases under the common law, and others, notably *Ex parte Kearney,* 7 Wheaton, 38, decided before the Act of 1831, limiting the power of Federal Courts in the punishment of contempt and also prior to the Habeas Corpus Act of 1867.

A prisoner may have a judicial inquiry in a Court of the United States into the very truth and substance of the causes of his detention, although it may become necessary to look behind and beyond the record of his conviction to a sufficient extent to *test the jurisdiction* of the Court to proceed to judgment against him. *Frank* v. *Mangum,* 237 U. S., 308, at p. 331.

In *Ex parte Lange,* 18 Wall., 163, 166, the Court declared that its authority.

> "to issue this writ and to examine the proceedings in the inferior Court, so far as may be

> necessary to ascertain whether that court has exceeded its authority is no longer open to question."

In *Ex parte Siebold* (*supra*) the Court not only asserted its right by habeas corpus to enquire as to (page 376)

> "clear and manifest *want of criminality* in the matter charged, such as in effect to render the proceedings void";

but that (page 377)

> "personal liberty is of so great moment in the eye of the law that the judgment of an inferior court affecting it is not deemed conclusive, but that * * * the question of the *court's authority* to try and imprison the party *may be reviewed* on habeas corpus, by a superior court or judge having authority to award the writ."

The addition of the words "by a Superior Court, or judge having authority to award the writ," is most significant in its recognition that a single judge, under the statute, has the power and authority that the Supreme Court itself has to award the writ.

In *Ex parte Parks,* 93 U. S., 18, the Court declared a writ of habeas corpus to be appropriate and effective to enquire sufficiently to determine that (page 23)

> "no act beyond the powers conferred on it"

had been committed by the lower court, and that

> "if it (this Court) finds that the Court below has transcended its powers"

relief will be granted by this means.

In *Cuddy, Petitioner,* 131 U. S., 280, 286, which was an appeal from an order of the Circuit Court refusing a petition for a writ of habeas corpus, this Court said:

"The judgment being attacked collaterally, and the record disclosing a case of contempt, *and not showing one beyond the jurisdiction of the court,* it must be presumed, in this proceeding, that the evidence made a case within its jurisdiction to punish in the mode pursued here. We do not mean to say that this presumption as to jurisdictional facts, about which the record is silent, may not be overcome by evidence. *On the contrary, if the appellant had alleged such facts as indicated that the misbehavior with which he was charged was not such as,* under Section 725 of the Revised Statutes, *made him liable to fine or imprisonment, at the discretion of the Court, he would have been entitled to the writ, and, upon proving such facts, to have been discharged.* Such evidence would not have contradicted the record." (Italics ours.)

The instant case came directly within the proviso above stated.

The Information alleged that certain proceedings "have been pending in this Court" (*Record,* fols. 131-134), and further that "The said letter, as well as the publication thereof, as aforesaid, each tended and was calculated and intended by the defendant to influence this Court in its consideration of *suits* and *proceedings* aforesaid, pending when said letter was written, delivered," etc. (Record, fol. 176-177.)

The conviction or judgment went no further than the Information "as charged" (Record, fol. 2515) in the matters specified.

There was no allegation or finding that any subject-matter was pending *sub judice* or imminent, but merely that the proceedings and suits were pending.

On the other hand, the petition for the writ expressly alleged (Record, fols. 112-113):

"a. That neither on the 6th nor the 7th day of October, 1919, was there pending *sub judice* before said District Judge or said Court any matter or judicial determination in any suit or proceeding mentioned in the Information or in any suit or proceeding consolidated with any or either of such suits and proceeding.

"b. That all orders and judicial determinations which were referred to in the letter of October 6, 1919, from your petitioner to Lewis Nixon, Public Service Commissioner, set forth in the said Information, had been previously made and concluded and that no hearing was pending, awaiting determination, upon any of said orders or judicial determinations or the subject matter thereof."

And the Return to the writ set forth, as we have shown elsewhere (Record, fols. 2526-2527):

"IV. Still insisting that your Honor is without authority to issue a writ of habeas corpus and that the petition for the writ herein is insufficient in law, and without waiver thereof, this respondent says: On October 6, 1919, there was not pending awaiting decision any order or judicial determination mentioned in the letter of that date from the petitioner to Lewis Nixon, set forth in the Information, but the same was still within the control of the District Court of the United States for the Southern District of New York and subject to change."

The petitioner's application for the writ came, therefore, directly and exactly within the case put in *Re Cuddy* (*supra*): (a) The "record is silent" as to any subject-matter pending *sub judice*. (2) The petition alleged that there was in fact none such pending. (3) The return admitted that "there was not pending awaiting decision any order or judicial determination."

The petitioner thus met not only every requisite

mentioned in *Re Cuddy, supra,* but in the most satisfactory form showed that "new" fact or element on his application for the writ which HOUGH, *C. J.,* in his concurring opinion in the instant case, said had not been shown (Record, fol. 3482). The allegation in the Petition and the express admission in the Return were tantamount to the highest order of proof allowed and provided for by the Habeas Corpus Act (R. S., Sec. 761).

In *Hans Nielsen, petitioner,* 131 U. S., 176, 184, the Court said there must be not merely

> "jurisdiction of the cause,"

but

> "authority or power to condemn the prisoner"

lacking which

> "a party is entitled to a habeas corpus."

This thought respecting jurisdiction is also tersely expressed by Mr. Justice HOLMES with respect to a controversy which concerns a subject limited by Federal Law (as is punishment for contempt).

> "The jurisdiction so far coalesces with the merits that a case not within the law is not within the jurisdiction of the Court" (*Lamar* v. *United States,* 240 U. S., 60, 64).

In *In re Mayfield,* 141 U. S., 107, 116, the Court said:

> "This Court has held, however, in a multitude of cases, that it had power to inquire with regard to the jurisdiction of the inferior court, either in respect to the subject-matter or to the person, even if such inquiry involved an examination of facts outside of, but not inconsistent with, the record."

In *In re Belt, petitioner,* 159 U. S., 95, the Court said (at p. 100):

> "The general rule is that the writ of habeas

> corpus will not issue unless the court, under whose warrant the petitioner is held, is without jurisdiction, and that it cannot be used to correct errors. Ordinarily the writ will not lie where there is a remedy by a writ of error or appeal; but in rare and exceptional cases it *may be issued,* although such remedy exists."

This Court, in discharging a prisoner, said in *Ex parte Hudgings,* 249 U. S., 378, 379:

> "The grounds for discharge were, that the Court had exceeded its jurisdiction by punishing as a contempt an act which it had no power to so punish, and that even if the act punished was susceptible of being treated as a contempt, the action of the Court was arbitrary, beyond the limits of any discretion possessed and violative of due process of law under the Fifth Amendment."

The decision in the *Hudgings* case, *supra,* we urged below, and again urge, as determinative of the two main points involved; (a) that there was no contempt because there was no obstruction to the administration of justice, and (b) that the relief against imprisonment is by habeas corpus, where an element of obstruction is lacking.

That was an original application to this Court for a writ of habeas corpus to relieve against a contempt commitment for asserted false testimony of a witness. The application to the Court did not differ in kind from an application to a judge of a lower court, as we have seen.

So we start, in considering the *Hudgings* case, with the comprehension that Judge MANTON, either in his capacity as a circuit judge or under his designation to perform the duties of a district judge, had the same power as the Supreme Court to issue and sustain the writ.

The only difference in the procedure was that in

the instant case "testimony" was taken, as provided in the Habeas Corpus Act (R. S., Sec. 761), so as to present the whole record, while in the *Hudgings* case that was done by setting forth the proceedings in the petition, "and a transcript of the stenographer's notes showing what transpired in the Court below, made a part of the argument of the petitioner and in substance conceded by all parties to be the record" (p. 380). We may say, parenthetically, that that was the course pursued in *Cuddy, Petitioner,* 131 U. S., 280, 281.

What the petitioner asserted, in the *Hudgings* case and the Court understood him to assert, as a foothold for relief on habeas corpus, was (a) "that the Court had *exceeded its jurisdiction* by punishing as a contempt (b) *an act* which it had *no power to so punish,* and (c) that the action of the Court was arbitrary, beyond discretion and violative of due process. A clear appreciation of these points, separately, disposes, we think, of the distinctions which were suggested by the Court below in the instant case. Note the use of the expressions in the *Hudgings* case, carried throughout the opinion "exceeded" and "excess" in relation to jurisdiction and power, which are asserted here in challenging jurisdiction. The reason that those terms are appropriate is because there is no *general* jurisdiction in the United States courts to punish for contempts. Its jurisdiction is a *limited* one, since the Act of 1831; hence the expressions "excess of jurisdiction" and "excess of power" are peculiarly appropriate. In discussions of constructive contempt the statutorially limited jurisdiction of the United States courts is all too frequently lost sight of, as it was below, in the citation of English and state court cases.

Next there should be noted that Mr. Chief Justice WHITE spoke of "an act which it had no power to so punish," and later on he defined what was such an act and the incidence of power to punish. There is no general power to punish an act alleged to be contemptuous; the power to punish depends not upon an allegation of a contemptuous act, but upon its actual existence; it must fall within the statutory *proviso.* A proceeding to punish for alleged contempt is *sui generis* in the mode of accusation, the method of inquiry and even in the mode of punishment (*Creekmore* v. *United States,* 237 Fed. Rep., 743; *Merchants Stock & G. Co.* v. *Board of Trade,* 201 Fed., 20). This was referred to later on in the opinion in the *Hudgings* case (at p. 383). Because it is *sui generis,* mere allegation is not sufficient. An information may be useful to establish the confines of the inquiry, but it is not provided for in any statute relating to contempt, nor by any criminal procedure on the subject. We are told that it is a usual method, but it is more honored in the breach than the observance. It does not give jurisdiction. It is not like an indictment, nor even like an Information touching a statutory offense or a common law crime. It is not accompanied by process. The order to show cause which usually accompanies it, as in this case, has no jurisdictional force. An *act* which the Court has *power* to punish is the requisite of jurisdiction, as is clearly pointed out by Mr. Chief Justice WHITE, in the *Hudgings* case.

The Court proceeded (at pp. 379 and 380) to state the duty of the Court to consider the case as within the exception to the rule established by this Court to justify "resort to the original jurisdic-

tion of this Court." That exception has nothing to do with an application to another court or judge where such a rule does not obtain. We make mention of it only because of the suggestion in the opinion of the court below that "what was done in the *Hudgings* case was done at least by a court empowered to review and set aside erroneous judgments in appropriate proceedings." Palpably this Court was exercising its original jurisdiction.

The opinion then proceeded to state the manner in which the alleged contempt occurred, including the following (at p. 381):

> "Finally the Court interrupted the examination by saying:
>
> " 'This witness is going to be committed for contempt of court. The Court is thoroughly satisfied, Mr. Witness, that you are testifying falsely when you say that you cannot recall of ever seeing Mr. MacMillan write, and this has happened several times during this trial with other witnesses, especially with your wife * * *
>
> " 'And it becomes the plain duty of the Court to commit you to jail, sir, for contempt, and before doing so, I think it is the duty of the Court to explain to you that the answer, "I do not remember of ever having seen him write," is just as false, is just as much contempt of court if you have seen him write, as it would be for you to say that you had never seen him write, without using the expression, "I do not remember".' "
>
> "In the same direction the Court said:
>
> " 'I am not going to allow you to obstruct the course of justice here, and if this nation has delegated power enough to this Court, and I am very sure it has, to deal with you in the manner proposed, I am going to do it.' "

The Petition in the record of that case (pp. 25-26) contained a further transcript of what took place:

> "The Court: Tell the Court whether you care to *take any further time on this matter*, do you?
>
> "The Witness: My time is your time.
>
> "The Court: I suggest that you might *confer with counsel.*
>
> "The Witness: *No, sir,* my answers will be exactly *as they have been.*
>
> "The Court: *Very well. You are adjudged to be in contempt* of this Court and you are ordered to be committed to jail forthwith. Mr. Clerk, you prepare the commitments. You are in the custody of the marshal from now on."

No reference is made in the opinion of the Court below in the instant case to the above quotation from the record in the *Hudgings* case, which was abstracted at length in our printed brief before the Court below. On the other hand the Court below said: "In the *Hudgings* case, *without* proof of guilt, without evidence, without any hearing, the Court forthwith ordered the imprisonment," etc.

It will be observed that (a) an opportunity to confer with counsel and for purging was allowed, such as it was, and (b) that the Court below had concluded that the act did obstruct justice, though there was no written finding to that effect. Slight safeguards for the liberty of the citizen, it is true, but sufficient to require the Supreme Court to determine the main question of the "erroneous doctrine" of the power of the Court.

This Court stated the question as follows in the *Hudgings* case:

> "Whether, then, power to punish for contempt exists in every case where a court is of

the opinion that a witness is committing perjury is the test we must here apply" (p. 382).

The procedural points and the punishment were passed by in the determination of the great principle involved. That appears in the language of the opinion (at p. 383):

> "Existing within the limits of and sanctioned by the Constitution, the power to punish for contempt committed in the presence of the court is not controlled by the limitations of the Constitution as to *modes of accusation* and *methods of trial* generally safeguarding the rights of the citizen." (Italics ours).

Had the Court intended to rest its decision either on the mode of accusation or the method of trial, the language quoted would have been quite beside the mark.

The opinion proceeds:

> "This, however, expresses no purpose to exempt judicial authority from constitutional limitations, since its great and *only purpose* is to secure judicial authority from *obstruction in the performance of its duties* to the end that means appropriate for the preservation and enforcement of the Constitution may be secured." (Italics ours). (Citing *Toledo Newspaper Co.* v. *United States*, 247 U. S., 402; *Marshall* v. *Gordon*, 243 U. S., 521.)
>
> "An obstruction to the *performance* of judicial duty *resulting from* an act done in the presence of the Court is, then, *the characteristic* upon which *the power* to punish for contempt *must rest.*"

We have, then, (1) the purpose—the only purpose; (2) the characteristic act, and (3) the result, on which (4) the power must rest.

"Obstruction"—is the monumental thing.

We turn now to the point of next importance, stated at the head of this point: The exertion of the power, and means of enquiring into it by habeas corpus.

The Court, following on directly from the language above quoted, said (at p. 383):

> "This being true, it follows that the *presence* of that element *must clearly be shown* in every case where the power to punish for contempt is *exerted*—a principle which, applied to the subject in hand, exacts that in order to punish perjury in the presence of the court as a contempt there must be added to the essential elements of perjury under the general law the further element of obstruction to the court in the performance of its duty."

The predicate, upon which the Court granted the writ and discharged the petitioner, was that when a commitment is attacked upon the ground "that the court had exceeded its jurisdiction," the *presence, i.e.,* the *existence* of the element of an obstruction to the performance of judicial duty *must clearly be shown,* where the power has been exerted. Not merely that it must be charged, generally or indefinitely, but must be shown to exist.

This is made plainer still by the next paragraph of the opinion (at p. 384):

> *"Testing the power to make the commitment* which is under consideration in this case by the principles thus stated, we are of the opinion that the *commitment was void for excess of power*—a conclusion irresistibly following from the fact that the *punishment was imposed for* the supposed perjury alone without any reference to any *circumstance or condition* giving to it an obstructive effect."

The conclusion of the Court that the punishment was imposed "without any reference to any circumstance or condition giving to it an obstructive effect" was directly in the face of the pronouncement of the Judge below, which we have quoted from the report of the case at page 381:

> "I am not going to allow you to obstruct the course of justice here."

That was passed by, as the order or finding of Judge MAYER, that the petitioner was guilty "as charged" solely *in respect of such false statements,* should be passed by, to ascertain whether the presence or existence of an obstructive act was "clearly shown."

Far from being clearly shown in the instant case, there is an express admission in the Return (Record, fols. 2526-2528):

> "On October 6, 1919, there was not pending awaiting decision any order or judicial determination mentioned in the letter of that date from the petitioner to Lewis Nixon, set forth in the Information, but the same was still within the control of the District Court of the United States for the Southern District of New York and subject to change."

With that admission in the Return the instant case is stronger for the petitioner than was the *Hudgings* case for the petitioner there. In *Hans Nielsen,* petitioner, 131 U. S., 176, at p. 183, the Court said: "In the present case it appeared on the record in the plea of *autre fois convict,* which was admitted to be true by the demurrer of the government. We think that this was sufficient." In the present case the express admission in the Return is as strong as an admission of fact flowing from a demurrer.

Does the all-important expression in the *Hudg-*

ings case that we have quoted, with the context (*supra*), "Testing the power to make the commitment," mean less or other than that it is the office of this great writ, and of the Court or Judge issuing it, to test the power, by that means and in that way, to make the commitment by looking into the record deep enough to ascertain whether the presence—not merely the charge or opinion—of an obstruction to judicial duty was clearly shown.

And why should that not be so? A citizen, in this case a public official who is presumably trying to do his duty—even if mistakenly—in the same way as the Judge is trying to do his, is haled into court upon an assertion that he has obstructed the Judge in the performance of his judicial duty; the charge is directed by the same Judge and tried before the same Judge, against the protest of the citizen that another Judge be designated to hear the proceeding, and he is committed for a long period. Why should not some other judge or set of judges forthwith test the commitment by enquiring whether the presence or existence of the act of obstruction was clearly shown, and not merely that the accusing Judge, who was also the Trial Judge, thought that an obstruction was intended. If all of the ordinary modes of accusation and methods of trial are laid aside to preserve the integrity of the administration of justice, ought not the presence or existence of the obstruction be required to "clearly be shown" in a like summary way before another judge or judges, in "every case," as Chief Justice WHITE used those terms?

The principal reason why an inquiry in a contempt case into the jurisdiction is proper by habeas corpus proceedings, is that the jurisdiction of the United States Courts, since the act of 1831, follow-

ing the Peck controversy, is not a general jurisdiction, but a limited jurisdiction, dependent in every case upon a proviso embodied in the Statute. While, therefore, there is inherent power in the United States Courts to punish for contempts, it is a limited power, and for that reason may be examined into in "every case."

Here the Court below said: "In the present case sentence was imposed at the end of legal proceedings of a thorough and deliberate nature," etc. That the legal procedure has been deliberate and thorough has nothing to do with the principle involved. Analogy or lack of analogy does not depend on speed or brusqueness.

The *Hudgings* case did not rest on lack of deliberateness, or thoroughness, or exceptional expedition. We have already pointed out that, in the opinion in that case, emphasis was laid upon the fact that the ordinary methods of accusation and trial might be dispensed with in contempt cases.

The concluding comment of the Court below in the instant case (Record, fols. 3460-3461):

> "We find no reason why this case is not governed by the general rule that a habeas corpus proceeding cannot be used as a writ of error but must be limited to jurisdictional questions,"

shows a disregard of the main attack made by us upon the conviction which is upon jurisdictional grounds; our position is and has been always that the general procedure in a contempt case where the Court lacks jurisdiction, or has exerted "excess of power," is to proceed by a writ of habeas corpus and not by writ of error. That has been held so many times in the cases cited in this brief, especi-

ally those at the head of this Point, that no useful purpose would be served by citing them again.

In *Ex parte Lange,* 18 Wall., 163, 165-178:

> "On consideration of the petition, which was filed in this case at a former day, the Court was of opinion that the facts therein recited very fairly raised the question whether the Circuit Court, in the sentence which it had pronounced, and under which the prisoner was held, had not exceeded its powers. It therefore directed the writ to issue, accompanied also by a writ of certiorari, to bring before this Court the proceedings in the Circuit Court under which the petitioner was restrained of his liberty. The authority of this Court in such case, under the Constitution of the United States, and the 14th section of the Judiciary Act of 1789, to issue this writ, and to examine the proceedings in the inferior Court, so far as may be necessary to ascertain whether that Court has exceeded its authority, is no longer open to question. The cases cited in the note below (*Hamilton's case,* 3 Dall., 17; *Burford's case,* 3 Cranch, 448; *Ex parte Bollman,* 4 Cranch, 75; *Ex parte Watkins,* 3 Pet., 193; S. C., 7 Pet., 568; *Ex parte Metzger,* 5 How., 176; *Ex parte Kaine,* 14 How., 103; *Ex parte Wells,* 18 How., 307; *Ex parte Milligan,* 4 Wall., 2; *Ex parte McCardle,* 6 Wall., 318; S. C., 7 Wall., 506; *Ex parte Yerger,* 8 Wall., 85) will, when examined, establish this proposition as far as judicial decision can establish it.
>
> "Disclaiming any assertion of a general power of review over the judgments of the inferior courts in criminal cases, by the use of the writs of habeas corpus or otherwise, we proceed to examine the case as disclosed by the record of the Circuit Court and the return of the marshal, in whose custody the prisoner is found, to ascertain whether it shows that the

Court below had any power to render the judgment by which the prisoner is held.

* * * * * * * *

"There is no more sacred duty of a Court than, in a case properly before it, to maintain unimpaired those securities for the personal rights of the individual which have received for ages the sanction of the jurist and the statesman; and in such cases no narrow or illiberal construction should be given to the words of the fundamental law in which they are embodied. Without straining either the Constitution of the United States, or the well settled principles of the common law, we have come to the conclusion that the sentence of the Circuit Court under which the petitioner is held a prisoner was pronounced without authority, and he should, therefore, be discharged."

In *Hans Nielsen, Petitioner,* 131 U. S., 176, at p. 184, Mr. Justice BRADLEY said, delivering the opinion of the Court reversing, on appeal, a final order refusing to issue a habeas corpus, and directing that a writ issue:

"A party is entitled to a habeas corpus, *not merely where the court is without jurisdiction of the cause, but where it has no constitutional authority or power to condemn the prisoner.* As said by Chief Baron GILBERT, in a passage quoted in *ex parte Parks*, 93 U. S., 18, 22: 'If the commitment be against law, as being made by one who had no jurisdiction of the cause, or for a matter for which by law no man ought to be punished, the courts are to discharge.' This was said in reference to cases which had gone to conviction and sentence. Lord HALE laid down the same doctrine in almost the same words (2 Hale's Pleas of the Crown, 144). *And why should not such a rule prevail in favorem libertatis?* If we have seemed to hold the con-

> trary in any case, it has been from inadvertence."

This case is most valuable, for there could be no doubt that the Court had jurisdiction of the cause, viz., the crime of unlawful cohabitation for which he was convicted and punished, but the Court sustained the writ upon the ground that the Court below had no constitutional authority or power to condemn the prisoner, for the reason that the crime of adultery with which he was charged, although on different dates, was included in the crime of unlawful cohabitation. For that purpose the Court went behind the record and looked into the facts, saying in conclusion (pp. 190-191):

> "The Court was without authority to give judgment and sentence in the latter case, and should have vacated and set aside the same when the petitioner applied for a habeas corpus."

CONCLUSION.

It is respectfully submitted that the prayer of the petitioner should be granted for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit (Petition, page 29), to the end that the case may be reviewed and determined by your Honorable Court, and that the judgment of the said Circuit Court of Appeals and every part thereof, may be reversed by your Honorable Court.

JOHN P. O'BRIEN,
Corporation Counsel,
Of the City of New York,
Attorney and Counsel for Petitioner.

EDMUND L. MOONEY,
Of Counsel.

Subject Index

PAGE

The Petitioner's Grounds for Review 15

Questions of Public Interest and Great Importance 15

Action of District Court in Excess of Its Powers and Beyond Its Jurisdiction to Punish for Contempt, Because No "Misbehavior" and No Obstructive Effect..... 18

The Circuit Judge Had Jurisdictional Authority to Issue the Writ of Habeas Corpus.. 52

The Circuit Judge, in Addition to His Power as Such, Was Exercising the Powers of a District Judge, Under Designation..... 69

No Appeal Lay to the Circuit Court of Appeals from a Judge's Order 76

This Court Had Exclusive Jurisdiction to Review the Order Discharging the Petitioner.... 87

The Determination of the Circuit Court of Appeals Should Be Reversed for its Lack of Jurisdiction, Regardless of the Other Questions Raised 89

Habeas Corpus Was the Proper and Effective Remedy 90

The Circuit Court of Appeals Disregarded the Rulings of this Court on the Questions Involved 111

The Form of the Writ Was Not Defective; Its Form Was Immaterial 119

Table of Cases

PAGE

Ainsworth ads. DeArnaud, 24 App. D. C., 167 20
Atlantic & N. C. R. Co. ads. Cuyler, 131 Fed., 95 90
Ayers, In re, 123 U. S., 443 90
Barrett ads. Lambert, 157 U. S., 697.....66, 76, 82
Beatson v. Skene, 5 Hurl. & Nor. (Excheq.), 838 20
Belt, In re, 159 U. S., 95 97
Bigelow, Ex parte, 113 U. S., 328 96
Blair, Matter of, 4 Wis., 522 120
Board of Control ads. Collins, 219 Fed., 885.... 88
Board of Trade ads. Merchants Stock & G. Co., 201 Fed., 20 .....99, 115
Bollman, Ex parte, 4 Cranch, 74 .....57, 67
Bridges, Ex parte, 2 Woods, 428 90
Burke ads. Cross, 146 U. S., 82 82
Carland ads. McClellan, 217 U. S., 268 58
Carolina Glass Co. v. State of So. Carolina, 240 U. S., 305 88
Carper v. Fitzgerald, 121 U. S., 87
14, 66, 67, 70, 75, 76, 77, 78, 80, 81, 85
Chatterton v. Secretary of State for India, 2 Q. B. (1895), 189 20
Clarke ads. United States, 1 Gall., 497.....54-5, 74
Collins v. Board of Control, 219 Fed., 885.... 88
Colorado ads. Patterson, 205 U. S., 454 35
Cornett v. Williams, 20 Wall., 226, 250 ....93, 110
Craig, Ex parte (Circuit Judge Manton), 274 Fed., 177 13-4
Creecy ads. Pierce, 210 U. S., 387..... 88
Creekmore v. United States, 237 Fed., 743....99, 115
Crosby, Lord Mayor, 3 Wilson, 188..... 111
Cross v. Burke, 146 U. S., 82 82
Cuddy, Petitioner, 131 U. S., 280
90, 93, 95, 98, 110, 116, 117

PAGE

Curtis, Ex parte, 106 U. S., 371 121
Cuyler v. Atlantic & N. C. R. Co., 131 Fed., 95 90
Daniels, In re, 131 Fed., 95..... 90
Davis, Ex parte, 112 Fed., 139..... 66
Dawkins v. Paulet, L. R., 5 Q. B., 94..... 20
DeArnaud v. Ainsworth, 24 App. D. C., 167..... 20
Dick ads. Whitney, 202 U. S., 132.....54, 59
Dock Bridges, Ex parte, 2 Woods, 428 90
Eckart, Re, 166 U. S., 481..... 96
Eno ads. New York, 155 U. S., 89..... 88
Farr v. Valentine, 38 App. D. C., 413..... 20
Fenton ads. Grammer, 268 Fed., 943..... 88
First Nat. Bk. v. Chicago T. & T. Co., 198 U. S., 280 89
Fisk, Ex parte, 113 U. S., 713..... 90
Fitzgerald ads. Carper, 121 U. S., 87..... 14, 66, 67, 70, 75, 76, 77, 78, 80, 81, 85
Fong Yue Ting v. United States, 149 U. S., 698 .....66, 74
Frank v. Mangum, 237 U. S., 309..... 91
Funk ads. Hoskins, 239 Fed., 278.....16, 86
Gathercole v. Miall, 15 M. & W., 319..... 21
Galpin v. Page, 18 Wall., 350..... 31
Gounod ads. Metzler, 30 L. T. R., N. S., 264..... 33
Grammer v. Fenton, 268 Fed., 943..... 88
Greene v. Louisville & I. R. R. Co., 244 U. S., 499 88
Gregory, Matter of, 219 U. S., 210.....40, 92, 110
Hale, In re, 139 Fed., 496; 201 U. S., 43..... 55
Harkrader v. Wadley, 172 U. S., 148 .....76, 82
Henry v. Henkel, 235 U. S., 219..... 112
Horn v. Mitchell, 243 U. S., 247..... 88
Horner v. United States, 143 U. S., 207..... 88
Hoskins v. Funk, 239 Fed., 278.....16, 86
Hudgings, Ex parte, 249 U. S., 378
19, 88, 90, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 110, 115, 116

PAGE

Hyde v. Shine, 199 U. S., 62 97
Jacobi, Ex parte, 104 Fed., 681 .....66, 76
James ads. McKnight, 155 U. S., 685.....66, 76, 81
Kearney, Ex parte, 7 Wheat., 38 .....91, 110, 111
King, In re, 51 Fed., 434..... 66
Lamar v. U. S., 240 U. S., 60..... 96
Lambert v. Barrett, 157 U. S., 697.....66, 76, 82
Lange, Ex parte, 85 U. S., 163 (18 Wall, 163) 88, 90, 91, 107, 113, 115, 17
Lennon, In re, 150 U. S., 393 .....76, 82
Loney, In re, 134 U. S., 372..... 88
Louisville & I. R. R. Co ads. Greene, 244 U. S., 499 88
Ludlow-Saylor Wire Co., ads. Tyler Co., 212 Fed., 156 88
Macdonnell, In re, 11 Blatchford, 79 66
Mangum ads. Frank, 237 U. S., 309..... 91
Mayfield, In re, 141 U. S., 107 90, 95, 96, 116, 117, 118
McCarthy ads. Rumely, 250 U. S., 283 112
Memphis, City of, ads. Union & Planters Bank, 189 U. S., 71..... 88
Merchants Stock & G. Co. v. Board of Trade, 201 Fed., 20 .....99, 115
Metzler v. Gounod, 30 L. T. R., N. S., 264..... 33
Milligan, Ex parte, 4 Wall., 2 56, 57, 76, 90, 120, 122
Miner v. Detroit Post & T. Co., 49 Mich., 358.... 21
Mitchell ads. Horn, 243 U. S., 247..... 88
Moore v. Dempsey, 261 U. S., 86..... 95
McCardle, Ex parte, 73 U. S., 318..... 58
McCarron v. The People, 13 N. Y., 74..... 73
McKnight v. James, 155 U. S., 685.....66, 76, 81
McLeod v. St. Aubyn (1899), A. C., 549; 81 L. T. R., 158..... 22
McLish v. Roff, 141 U. S., 661..... 84
McVeigh ads. Windsor, 193 U. S. 274..19, 41, 93, 110

PAGE

New York v. Eno, 155 U. S., 89 88
Nielsen, Hans, Petitioner, 131 U. S., 176
90, 92, 95, 108, 110
Parks, Ex parte, 93 U. S., 18....88, 92, 110, 112, 113
Patterson v. Colorado, 205 U. S., 454 35
Paulet ads. Dawkins, L. R., 5 Q. B., 94..... 20
Petri v. Creelman L. Co., 199 U. S., 487..... 63
Pierce v. Creecy, 210 U. S., 387..... 88
Potter v. Frohbach, 133 Wis., 1..... 120
Pridgeon ads. United States, 153 U. S., 49.... 114
Raton Waterworks Co. v. City of Raton, 249
U. S., 552 88
Reed, Ex parte, 100 U. S., 13 .....93, 110
Reese, In re, 98 Fed., 984 90
Riddle v. Dyche, 262 U. S.—(May 21, 1923).... 52
Robinson, Ex parte, 19 Wall., 505 111
Robinson, Ex parte, 144 Fed., 835 90
Roff ads. McLish, 141 U. S., 661 84
Royall, Ex parte, 117 U. S., 241 .....88, 90
Rumley v. McCarthy, 250 U. S., 283..... 112
Savin, Petitioner, 131 U. S., 267 30
Schenck v. United States, 249 U. S., 47..... 43
Schmeid, Ex parte, 1 Dillon, 587 66
Secretary of State for India ads. Chatterton,
2 Q. B. (1895), 189 20
Siebold, Ex parte, 100 U. S., 371
88, 90, 91, 92, 113, 118
Skene ads. Beatson, 5 Hurl. & Nor. (Excheq.),
838 20
South Carolina, State of, ads Carolina Glass
Co., 240 U. S., 305 88
Spalding v. Vilas, 161 U. S., 483.....17, 20
State ex rel. Taylor v. Supervisors, 64 Wis.,
218 120
Toledo Newspaper Co. v. United States, 247
U. S., 402 .....19, 22, 35, 36, 38
Toledo Newspaper Co. v. U. S., 237 Fed., 986..36, 37

PAGE

Toledo Newspaper Co. ads. U. S., 220 Fed., 458 36
Tracy, Ex parte, 249 U. S., 551 ..... 55, 63
Tyler Co. v. Ludlow-Saylor Wire Co., 212 Fed., 156 88
Union & Planters Bank v. City of Memphis, 189 U. S., 71 88
United States v. Clarke, 1 Gall., 497 ..... 54-5, 74
United States ads. Toledo Newspaper Co., 247 U. S., 402 ..... 19, 22, 35, 36, 38
United States ads. Toledo Newspaper Co., 237 Fed., 986 36
United States v. Toledo Newspaper Co., 220 Fed., 458 36
United States, Ex parte, 226 U. S., 420 ..... 63, 65, 67, 69
United States ads. Creekmore, 237 Fed., 743 ..... 99, 115
United States v. Duell, 172 U. S., 576 75
United States ads. Fong Yue Ting, 149 U. S., 698 ..... 66, 74
United States ads. Horner, 143 U. S., 207 88
United States v. Pridgeon, 153 U. S., 49 114
United States ads. Schenck, 249 U. S., 47 43
Valentine ads. Farr, 38 App. D. C., 413 20
Vilas ads. Spalding, 161 U. S., 483 ..... 17, 20
Wadley ads. Harkrader, 172 U. S., 148 ..... 76, 82
Wason v. Walter, L. R., 4 Q. B., 73 22
Watkins, Ex parte, 3 Pet., 193; 7 Pet., 568 ..... 91, 110, 111
Watts, In re, 190 U. S., 1 97
Webb, Ex parte, 225 U. S., 663 67
Wells, Ex parte, 18 How., 307 90
Whitney v. Dick, 202 U. S., 132 ..... 54, 59
Whitten v. Tomlinson, 160 U. S., 231 83
Williams ads. Cornett, 20 Wall., 226, 250 ..... 93, 110
Windsor v. McVeigh, 93 U. S., 274 ..... 19, 41, 93, 110
Yarborough, Ex parte, 110 U. S., 651 ..... 112, 113

Supreme Court of the United States

CHARLES L. CRAIG
Petitioner,

against

WILLIAM C. HECHT, United States Marshal for the Southern District of New York,
Respondent.

83 OCTOBER TERM, 1923.

BRIEF ON BEHALF OF THE PETITIONER ON WRIT OF CERTIORARI

The petitioner, who is the Comptroller of the City of New York, was charged with contempt of Court for certain expressions criticizing the action of District Judge MAYER, now Circuit Judge, in connection with receivership proceedings of the traction lines of the City of New York, which had been instituted in the District Court for the Southern District of New York. The letter is set forth in the Information (Record, fols. 156-167, pp. 52-56) and was as follows:

"October 6, 1919.

"Hon. Lewis Nixon,
Public Service Commissioner,
No. 49 Lafayette Street,
New York City.

Dear Sir:

Replying to your letter of October 1st:

Apparently without inquiry and without information, you have fixed the time for the proposed conference upon a date which, if observed, would require the members of the Fi-

nance and Budget Committee of the Board of Estimate and Apportionment (comprising the entire Board), to drop the preparation of the largest budget in the history of New York City, in which work, as you could easily have ascertained, they have been for some time and must continue to be engaged in daily sessions from early to late.

In your letter you say:

'It may be necessary to review figures and examine leases and agreements that will consume time.'

Before any such conference can be seriously considered, and as an evidence of good faith on the part of those acting by and under the authority of United States District Judge MAYER, there must be a reversal of the policy for which Judge MAYER is responsible, of denying to myself and other members of the Board of Estimate and Apportionment any access to original sources of information concerning the property and affairs of these various public utility corporations holding franchises to operate in the streets of New York.

When the applications were made to Judge MAYER in the 'friendly' proceedings instituted by those interested in these corporations for the appointment of a Receiver of their own liking, if not of their own selection, the Corporation Counsel of the City of New York acting under instructions from the Board of Estimate and Apportionment given at my instance, urged upon Judge MAYER that he appoint an additional or co-receiver acceptable to the Board of Estimate and Apportionment, to see that the facts and conditions of the corporations involved were fairly and fully presented to the United States District Court in the course of the receivership, so that any orders or decrees that might be made by the Court would be fair and just to The City of New York, and the members of the Board of Estimate and Apportionment might be accurately informed with respect thereto in order that

any action deemed necessary by the City might be taken.

As you must be aware, it is a very common thing in large receiverships to appoint additional receivers, particularly where there are varied and conflicting interests; and I have never been able to understand why in a matter of great public concern such as this, Judge MAYER set himself against it. It was clearly understood that conditions were certain to develop in these receiverships where the responsible authorities would be urged to take action which no honest or intelligent man could be expected to consider without the most exact and complete information upon the entire subject. Judge MAYER refused to grant any of the relief sought by the City. He not only denied the relief, but he made orders which preclude any application being made by the Municipal authorities to any other Court or Judge for any right of examination into the affairs or conditions of these corporations seeking Municipal aid and favor.

Truth is the mightiest weapon in every controversy. The orders of Judge MAYER deny to the Municipal authorities the opportunity to ascertain the truth.

The franchises and rights enjoyed by these corporations were mostly all procured many years ago when corrupt political rings were in control of public affairs and the darkest scandals of Municipal history, both in the old City of New York and in the City of Brooklyn, prior to consolidation, are those in relation to such grants. The affairs of the franchise holding corporations have been in the hands of the boldest and most unscrupulous manipulators engaged in the exploitation of the rights obtained from corrupt political rings. Up to the present moment they have defied every power that has sought to open up the books and original records for search and examination in the public interests. They will open and open wide without any reservations or restrictions before

there will be any conference so far as I am concerned.

It seems to me a monstrous thing that an order of a Federal Judge in a Court of Equity should stand between the public and the truth under such circumstances. Such an order is hostile to every interest of The City of New York in these controversies. Its operation and effect is to disarm the Municipal authorities, to deny them the most effective instrument of redress, and to force them into a contest with corporate powers entrenched in darkness and concealment.

The responsibility for the turmoil, delay and dissatisfaction that has followed upon the orders of Judge MAYER, denying to The City of New York any representation in these receiverships, rests upon those who procure and are protected by such orders.

As a first and preliminary evidence of good faith, those who desire such a conference and a reasonable solution of existing complications, should procure the entry of orders by Judge MAYER putting The City of New York on an equal footing with the private interests active in the receiverships. A refusal to do this can but prolong and embitter the controversy; and it will not in the end procure any advantage whatever to the traction interests.

Yours very truly,

CHARLES L. CRAIG,
Comptroller."

This letter was signed by the petitioner "who was then Comptroller and chief financial officer and a member of the Board of Estimate and Apportionment of the City of New York" (Record, fols. 1719-1724; pp. 573-574, in his official capacity as Comptroller (Record, fols. 154-156, 167; pp. 52, 56) and was in response to the invitation of Public Service Commissioner Nixon, who had called a conference for the purpose of discussing the financial

and physical condition of the traction lines in the City of New York, including those involved in the suits and proceedings pending in the District Court and considering any suggestions that might be made by the conferees with respect to the future of the said lines and the relations between them and the City of New York (Record, fols. 205-209; pp. 69-70). It was further alleged that the petitioner "did cause the said letter to be delivered to the said Public Service Commissioner and to the persons attending the said conference at the said office of said Public Service Commissioner" (Record, fols. 167-168; p. 56). The letter was physically delivered into Commissioner Nixon's hand while the conference was actually being held, as he sat upon the dais in the Public Service Commission Room. Some time before the letter was received he had asked the press who were not representatives of companies to withdraw. He opened the envelope, glanced through the letter and then read it aloud. (Record, fols. 392, 393; 397-399; pp. 131-133). At that time the Comptroller was in fact engaged in the performance of imperative public duties (Record, fols. 1791-1797; pp. 597-599)—as appears on the face of the letter itself and as was testified to by the Comptroller (Record, fols. 1812-1814).

It was still further alleged in the Information that the petitioner "did cause the same letter to be published in various newspapers" (Record, fol. 168; p. 56), but, as to the latter, it was shown that the letter reached the public press through a usual routine of giving out letters for publication which prevailed in the Comptroller's office.

The writing was an isolated act as appears by the Information, and no matter of aggravation was alleged.

The circumstances under which the letter was

written, and the proceedings instituted, were as follows:

The Public Service Commissioner had addressed a formal communication to the Comptroller requesting him to attend a conference. That letter is set forth at fols. 2191-2198 of the Record, Governments Exhibit No. 1. Commissioner Nixon had written an additional letter to the petitioner on the subject (Record, fols. 1779-1780; p. 593).

Prior to the calling of the conference on application being made for the appointment of a Receiver or Receivers of the Railway Company's properties, the petitioner in his capacity as Comptroller had made application, at the express direction of the Board of Estimate and Apportionment of the City of New York, for the appointment of himself as a co-receiver, to serve without compensation (Record, fols. 1761-1764; 3150-3155; pp. 587-588; 1050-1052) so that he might have access to original sources of information and protect the interests of the City in the operation of the railways. The City had vast interests in the railway properties in many ways (Records, fols. 1729-1744; pp. 576-582) as was recognized by Judge MAYER himself (Record, fols. 1747-1749; p. 583).

Judge MAYER, however, declined to appoint the Comptroller as co-receiver, holding that there was no need or occasion, at that time at least, for the appointment of a co-receiver, but without prejudice to renewal of the application (Record, fols. 3216-3218; pp. 1072-1073) which, however, was never renewed, and the receiver was made permanent on January 22, 1919 (Record, fols. 3202-3219; pp. 1068-1073).

During the course of the receivership Judge MAYER directed that information be furnished to the officials of the City of New York, but the Comptroller did not know that the corporation counsel

was being served with notice of the proceedings nor discuss them with him (Record, fols. 1766-1767; p. 589).

The counsel who had formerly been counsel for the Railway Companies was retained by the Receivers appointed by Judge MAYER (Record, fol. 1839; p. 613), and the personnel had not changed so that so far as original sources of information were concerned, affairs were in exactly the same position as they were before the receivers were appointed (Record, fols. 1841-3; pp. 614-615). One of the persons connected with a traction company had on a public occasion endeavored to prevent and announced his intention to prevent access to original sources of information (fols. 1843-1844; p. 615). Information had come to the Comptroller with respect to transactions of the several companies "which no human being would ever suppose for a minute would be voluntarily disclosed by anyone identified with the Company" (Record, fols. 1845-1846; pp. 615-616), and he knew when he wrote the letter that information had actually been withheld even under public pressure, and even when the person had been subjected to an oath, and that information had been falsified by the persons in possession of the records, at a time anterior to the receiverships. He also knew that in other instances the books of these very railroad companies had been sold in great quantities to junk men for the purpose of reducing them to pulp and that they had been reduced to pulp and the rights of the litigants adversely affected by the destruction of the books (Record, fols. 1846-1847; pp. 616). Judge MAYER himself characterized the latter incident as "a matter of almost common knowledge" (Record, fols. 1848-9; pp. 616-617). That was prior to the appointment of these receivers.

Much dissatisfaction and turmoil arose in the

operation of the railways and many propositions were put forward by and under the direction of the Court and by and under the direction of the public authorities in an attempt to solve the great difficulties that arose (Record, fols. 1729-1769; pp. 577-590). To state the matter briefly, the policies of Judge MAYER and that of the public officials were in direct antagonism as an examination of the record will disclose (fols. 3022-3096; pp. 1008-1032).

In that situation Public Service Commissioner Nixon called the conference, which has been alluded to.

The Court had not suggested the conference, but when Commissioner Nixon had suggested it, the counsel for the receivers had conferred with the Court and asked him (Judge MAYER) whether they should attend it and carry out some important suggestions (Records, fols. 1112-1113; pp. 371-372) and they did attend for that purpose (Record, fols. 1112-1116; pp. 371-372).

At the time that the letter was read at the conference, one of the counsel for the receivers asked for a copy of the letter, stating that the letter was in many respects false (Record, fols. 1114-1116; p. 372). A copy was made, and he took it and showed it to Judge MAYER (Record, fols. 1082-1084; 1100-1102; pp. 361, 367-368) and took a verbal message or direction from Judge MAYER to Col. Caffey, the District Attorney, to institute a contempt proceeding (fols. 1174-1176; pp. 391-392). It is not clear, and was not made clear, whether at the time the proceedings were directed to be instituted the letter had been published in the newspapers (Record, p. 376; fol. 1127). The letter was not given out for publication by the Comptroller, who testified that he had no intention that it should be published, and that publicity defeated the very purpose that he had in mind

when he wrote the letter (Record, fols. 1821-1822; 1988-1994; pp. 607-608; 663-665), but after it had been read at the conference the newspaper men communicated with the Secretary of the Finance Department and asked for a copy of the letter which they had heard was read at the conference, and in ordinary and regular routine the Secretary of the Finance Department, who is an appointee of and paid by the City of New York, gave the letter out for publication (fols. 612; 651-653; pp. 204; 217-218) without any direction of the Comptroller nor with his knowledge (Record, fols. 1978-1981; pp. 660-661).

An order was made by District Judge MAYER requiring the petitioner to show cause why he should not be declared in contempt of the District Court. The petitioner appeared, involuntarily, and challenged the jurisdiction of the Court in every stage of the proceeding (Record, fols. 211-213; 223-240; pp. 71; 75-80). The petitioner, successively, demurred and later pleaded Not Guilty and asked that another Judge of the District Court be designated to hear the proceedings, but his request was overruled by Judge MAYER (Record, fols. 244; 264, 1596; pp. 82-88; 532) who assumed to try the petitioner.

On the hearing the petitioner was a witness in his own behalf. He gave testimony as to his intention and purpose in writing the letter. Commissioner Nixon's letter fixing the time for the proposed conference came to him on the morning of October 6th (the date of his letter) and was one of the many things he had to attend to on that morning. His letter in reply was written in considerable haste. The writer's purpose was to "Get into the mind of Nixon the necessity for that kind of co-operation resulting in the public authorities being on an equal footing with those representing

the traction interests" (Record, fols. 1802-1805; p. 601).

The petitioner testified that he did not expect the Commissioner to read the letter at the conference; "the last thing on earth that had ever entered my head was that Mr. Nixon would be so foolish as to read that letter to the railroad attorneys that he had to negotiate with" (Record, fol. 1818; p. 606).

The petitioner further testified as to what he intended by the language employed in the letter; that what he meant by "original sources" was "all of those books, documents, records and memoranda in the possession of the various companies and in their archives that shed light upon the property and affairs of the companies in whatever manner, shape or form those may be kept" (Record, fols. 1832-1833; p. 611), and that he meant by "denying access" to original sources, the inability to have full and unrestricted access with power to compel any subordinate to produce or dig up whatever it might be or be suspected of being, all of the facts that relate to these different companies; that anything that cut us short of that was a denial of access to the original sources; and that the very purpose of the application that had been made to the United States District Court for the appointment of a co-receiver was to have some one who was in a position to bring about these disclosures, and the necessary effect of the order denying that application was to deny to the municipal authorities in question that kind of access to the original sources (Record, fols. 1832-1835; pp. 611-612). The petitioner further testified as to how and in what respects it was important to the financial interest of the City of New York, and to its citizens, to have its officials well informed of the matters pertaining to the railroad companies' affairs and that the most favorable and practicable way to this end

was that a co-receiver be appointed, who, in some way, would be representative of the City. The petitioner denied upon oath that he intended to convey the meaning that the District Judge had in point of fact denied access to original papers, except in so far as such denial might flow from his refusal to appoint him co-receiver (Record, fols. 1833-1835; p. 612). The application for the appointment of the Comptroller, as co-receiver, had been denied on the 22nd day of January, 1919, and the receiver had been made permanent.

At the time that the letter was written, October 6, 1919—which was nine months after the Court's denial of the motion for the appointment of the Comptroller as co-receiver—there was not pending *sub judice* in the District Court, before Judge MAYER or any other Judge, awaiting decision, any judicial determination. The subject matter of the petitioner's letter had long before been disposed of, as we have seen (Record, fols. 2526-2528; 3202-3219; pp. 842-843, 1068-1073).

Judge MAYER proceeded, after hearing testimony, to declare the petitioner in contempt of said Court *as charged* in said Information *in respect of* the matters set forth in paragraphs 1, 2, 3 and 4 of said Information (Record, fols. 2512-2516; pp. 838-839).

The paragraphs of the Information referred to are to be found in fols. 168-174 of the Record, all of which, upon their face, relate wholly to the criticism of long past judicial acts. Judge MAYER signed an order of commitment directing that the prisoner be imprisoned for a term of sixty days, sentence to be executed at the Essex County Jail, Newark, New Jersey, and thereupon the Marshal took the petitioner into custody (Record, fols. 109-111; p. 37).

The petitioner presented to Circuit Judge MANTON a petition for a writ of habeas corpus, while

in the custody of the Marshal. At that time Judge MANTON was acting under a designation, pursuant to Section 18 of the Judicial Code, appointing him to hold a session of the District Court for the trial of causes and for the hearing and disposing of such *ex parte and other business as might come before him*. Judge MANTON was the only Judge attending at that time to the Chambers business of the District Court (Record, fols. 2604; 2648-2658; pp. 868; 883-886). The petition was presented at *Chambers*, the District Court not being then in session (Record, fols. 2649-2658; pp. 2662-2666; pp. 883-889).

The petition for a writ of habeas corpus set forth among other things:

> "a. That neither on the 6th nor 7th day of October, 1919, was there pending *sub judice* before said District Judge or said Court any matter or judicial determination in any suit or proceeding mentioned in the Information or in any suit or proceeding consolidated with any or either of such suits and proceedings."
>
> "b. That all orders and judicial determinations which were referred to in the letter of October 6, 1919, from your petitioner to Louis Nixon, Public Service Commissioner, set forth in the said Information had been previously made and concluded and that no hearing was pending, awaiting determination, upon any of said orders or judicial determinations or the subject matter thereof (Record, fols. 112-113; p. 38).

The petitioner averred, among other things,

> "n. That neither the Court nor Judge acquired jurisdiction of the person of the defendant.
>
> "o. That neither the Court nor Judge had jurisdiction of the subject matter set out in the Information.
>
> "p. That the District Judge exceeded his jurisdiction in making the orders, judgment,

decree, and commitment made in the proceeding upon said information and each of them.

"q. That the said court and the said district judge acted in excess of its and his powers in finding your petitioner guilty of contempt (fols. 120-121; pp. 40-41)."

"19. Your petitioner further alleges that said order and commitment were and are void and were made without any jurisdiction in the court or the said judge to make, file or enter the same and that your petitioner is being deprived of his liberty without any lawful warrant or authority whatsoever and without due process of law and, since being taken into custody by said Marshal, as aforesaid, has been continuously so deprived of his liberty, in violation of the Constitution of the United States, and especially the Fifth Article of the amendments thereof and in violation of the laws of the United States" (Record, fol. 126; p. 42).

Circuit Judge MANTON granted the petition and issued the writ of habeas corpus.

The Return to the Writ explicitly set forth that:

"On October 6, 1919, there was not pending, awaiting decision, any order or judicial determination mentioned in the letter of that date from the petitioner to Louis Nixon set forth in the Information, but the same was still within the control of the District Court of the United States for the Southern District of New York and subject to change." (Record, fols. 2526-2528; pp. 842-843).

Upon the Petition, Return, Denial and Traverse (all of which appear in the Record [fols. 97, 2521-2554]), Circuit Judge MANTON, at Chambers, did "proceed in a summary way to determine the facts of the case by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require," as provided in the Habeas Corpus Act, R. S. Sec. 761. Thereupon the said Circuit Judge rendered his opinion and decision (*Ex parte*

Craig, 274 Fed. 177), holding that the District Court had exceeded its jurisdiction by an excess of power assuming to adjudge the petitioner guilty and made an order discharging the petitioner and directing that papers in the habeas corpus proceeding be *filed* with the Clerk of the District Court and that the order be *recorded* in said court (Record, fols. 16, 94, 95; pp. 6, 32), thus adopting and following the precise form and procedure of a Judge's order, such as was under consideration by this Court in *Carper* v. *Fitzgerald*, 121 U. S., 87.

After the petitioner's discharge in the habeas corpus proceeding, the Marshal presented to one of the Circuit Judges, assignments of error, together with a petition, and thereupon said Circuit Judge allowed an appeal from the order of discharge in the habeas corpus proceedings to the Circuit Court of Appeals for the Second Circuit and issued a citation (Record, fols. 1-15; pp. 1-5).

Petitioner thereupon applied to the Circuit Court of Appeals, on notice to the Marshal, to vacate and set aside the citation and order allowing the appeal and to dismiss the appeal, upon the ground that the Circuit Court of Appeals had not jurisdiction or power to entertain and decide the appeal, for the jurisdictional reasons set forth in said motion, which was thereafter denied.

After a hearing of the appeal in the Circuit Court of Appeals, that Court (ROGERS and HOUGH, *C. J.*, concurring, LEARNED HAND, D. J., dissenting) reversed the order sustaining the writ of habeas corpus and remanded the petitioner to the custody of the Marshal (Record, fols. 3391-3522; 3586-3591; pp. 1131-1174; 1196-1197). The opinions are reported 282 Fed., 138. Thereupon an application was made to this Court for a writ of certiorari which was granted.

The Petitioner's Grounds for Review

The petitioner asks the intervention of this Court on the following grounds, upon which the writ of certiorari was asked for:

I. He was not punishable by imprisonment, as for a contempt of court, for the reason that there was no misbehavior tending to obstruct the administration of justice; and the District Court acted in excess of its jurisdiction in sentencing him to imprisonment.

II. Petitioner's discharge by Circuit Judge MANTON in habeas corpus proceedings was proper.

III. The Circuit Court of Appeals was without jurisdiction to review the order of discharge made by Circuit Judge MANTON.

POINT I

This case and the questions therein are of public interest and great importance.

The urgent questions that are presented for decision by this Court are:

1. The Circuit Court of Appeals has held that a Circuit Judge has no jurisdictional authority to issue a writ of habeas corpus, notwithstanding its unbroken exercise since the creation of the office of Circuit Judge, and notwithstanding that there has been no express amendment of the Habeas Corpus Act in that respect.

The question involves the jurisdictional authority of thirty-four Circuit Judges and the newly created Circuit Judges, throughout the United States. The present decision confines the issuance of such writs, in practical effect, to the District Courts and the District Judges. This is discussed under Points III and IV, *infra*.

2. In entertaining jurisdiction of the appeal from the order of Circuit Judge MANTON, there was (a) a disregard of the uniform decisions of this Court that no appeal lies from an order of a Judge (b) a direct conflict of decision, upon the appealability of a Judge's order, with the Circuit Court of Appeals for the Fifth Circuit, which has held that a Circuit Court of Appeals had no appellate jurisdiction to review such an order (*Hoskins* v. *Funk*, 239 Fed. 278). In the interest of uniformity of decision this Court should interpose to settle the conflict. This is discussed under Point V, *infra*.

3. The main question is whether the District Court, possessing only limited powers to punish for contempt, acted in excess of its jurisdiction in assuming to punish the petitioner for contempt in writing a letter, nine months after the action of the Court which it criticized, when in his act there was no possibility of the "obstruction" of justice. This is discussed under Point II, *infra*.

4. The petitioner is confronted daily, in the discharge of his official duties as chief financial officer of the City of New York, with the possibility of an incarceration in the State of New Jersey, beyond the confines of his sphere of office, that would render him *functus officio* for sixty days.

5. The petitioner is prevented from freely exercising his office in safeguarding the financial interests of the City with regard to the traction properties, which are still under control of the Court, lest by word or act of a like or similar kind he be again put in jeopardy of imprisonment.

6. The petitioner is a member of the Charter Revision Commission, which is considering municipal ownership and operation, and this calls for comment on the presently existing judicial control, through receivers of such public utilities, and he is embarrassed and circumscribed in the performance

of his duties, lest legitimate and necessary criticism on such judicial control and operation be regarded as contemptuous, while Circuit Judge MAYER, under designation, is continuing in the management and control of such railways through receivers appointed by him when District Judge.

7. The appropriateness of the remedy, by Habeas Corpus, is discussed under Point VIII, *infra*.

This case presents "all the unfortunate possibilities of conflict and collision which might arise" from a further exercise by a municipal officer of the duties of his office in a situation where the municipality has vast financial interests in local transit properties which are, nevertheless, under the control of a Federal Court. A clash of words has been construed and punished as though it were a clash in acts, and, unless this Court reaches out and defines the legitimate scope of criticism, the municipal officer will not only be imprisoned, but will continue to be repressed in the free exercise of his duties after the term of imprisonment.

We feel that it may be fairly said that the honest expression by an official of his views on a public question within the sphere of his duties is as essentially an official act (*Spalding* v. *Vilas*, 161 U. S., 483) as would be an official order, and that the repression of the one, by the likelihood of recurrent punishment, is a continuing interference with the other.

Doubtless, because of the seriousness and importance of the questions involved, the Circuit Court of Appeals in its opinion said:

> "If this Court is in error in the conclusion at which the majority of the Court has arrived, it is by no means impossible that the Supreme Court can correct any mistake we may have made" (Record, page 1158, fol. 3473).

POINT II

The District Court acted in excess of its powers and beyond its jurisdiction, under the limited powers of a federal court, to punish for contempt, because the act for which petitioner was held guilty was not "misbehavior," and did not "obstruct," nor could it possibly have obstructed the administration of justice.

The letter was written nine months after the action of the Court which it criticized (Record, fols. 2199 and 3219) and nowhere in the information, evidence or commitment does it appear what future decision could possibly be influenced.

It did not relate to any pending or imminent *judicial* act. It related only to a possible *conference* of State and Municipal officials with the representatives of the railways. There was no intimidation, no threat and no consequence intimated except a failure of the proposed conference. If there was any obstruction it was of the conference, not of the Court.

The proceeding against the petitioner was brought under the Judicial Code, Section 268, the pertinent provision of which is as follows:

> "The said courts (United States Courts) shall have power * * * to punish, by fine or imprisonment, at the discretion of the Court, contempts of their authority: *Provided,* That such power to punish contempts shall not be construed to extend to any cases except the *misbehavior* of any person in their presence, or so near thereto as to *obstruct* the administration of justice. * * *" (Italics ours.)

The Court, while a Superior Court, when acting

under this Statute is exercising a sharply limited jurisdiction, which may always be inquired into.

Under this provision there must exist (a) "misbehavior" and (b) an act "to obstruct the administration of justice."

> "An obstruction to the performance of judicial duty resulting from an act done in the presence of the Court is the characteristic upon which the power to punish for contempt must rest."

Ex parte Hudgings, 249 U. S., 378, 383;

See also:

Toledo Newspaper Co. v. *United States,* 247 U. S., 402, where the same thought was expressed in these words, at page 419:

> "The test, therefore, is the character of the act done, and its direct tendency to prevent and obstruct the discharge of judicial duty * * *"

> "If the commitment be against law, as being made by one who had no jurisdiction of the cause, or for a matter for which by law no man ought to be punished, the court are to discharge." Bac. Abr. Hab. Corp. B. 10.

> "Though the Court may possess jurisdiction of a cause, of the subject matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things and cannot transcend the power conferred by the law."

Windsor v. *McVeigh,* 93 U. S. 274, 282.

By the 17th section of the Judiciary Act of 1789 the Courts of the United States had power to punish "all contempts of authority in any cause or hearing before the same."

The Act of March 23, 1831, was entitled "An

Act declaratory of the law concerning contempts of Court;" it later became Sec. 725 of the Revised Statutes and is now sec. 268 of the Judicial Code.

The Act of 1831 followed the acquittal of District Judge PECK, who was impeached for imprisoning an attorney for a criticism of one of his decisions, after the case had ended in his court.

We shall proceed to discuss

A. "*Misbehavior.*" The word in the Act of 1831 (which has been re-enacted without change as Section 268 of the Judicial Code), and upon which the entire jurisdiction of the Court depends, is "*Misbehavior.*" The word "misbehavior," as conferring summary jurisdiction, is out of joint, sense or rational connection, utterly so, with any official act on the part of a public officer like the Comptroller of the City of New York, who, mistakenly or otherwise, is pursuing a course that relates to the subject-matter of his office and duties within his sphere of office. In other words, misbehavior, however broadly construed, does not mean the wrong or wrongful exercise, or attempted exercise, of functions within the jurisdiction of the officer charged. Such acts are privileged (*Spalding* v. *Vilas,* 161 U. S., 483; *DeArnaud* v. *Ainsworth,* 24 App. D. C., 167; 5 L. R. A. (N. S.), 163; *Farr* v. *Valentine,* 38 App. D. C., 413; *Chatterton* v *.Secretary of State for India,* 2 Q B. (1895) 189; *Dawkins* v. *Paulet,* L. R., 5 Q. B. 94; *Beatson* v. *Skene,* 5 Hurl & Nor., (Excheq.) 838. It should be recalled that the letter was alleged in the Information to have been "in response to the invitation" (Record, page 52, fol. 155) of one official to another, and was in fact such (*id.,* pp. 731-736; fols. 2191-2211), and that when Mr. Nixon had suggested the conference, counsel for the receiver had conferred with Judge MAYER and asked him whether they should attend it and carry out some important suggestions (Record, fols.

1112-1113, p. 371). The statute does not mean that he shall be punished by imprisonment for transcending the bounds of official etiquette by the use of intemperate words in a letter. In other words, "*misbehavior*" as used in the statute means the physical or oral act of some person who is misbehaving in the ordinary sense of the word.

In *Miner* v. *Detroit Post & Tribune Co.*, 49 Mich., 358, Judge COOLEY, writing for the Court, pointed out the difference in moral quality between the publication of mere personal abuse and the discussion of matters of grave public concern.

That was an action for libel, it is true, but we cite it because of the eminence of the Judge who wrote in that case defining a principle of general application. The case itself touched a judicial act of an inferior Judge—the newspaper accused a magistrate of committing a Chinaman, without a charge made against him and without evidence and holding him under heavy bail, and yet it was held privileged, in the absence of malice.

In *Gathercole* v. *Miall*, 15 M. & W., 319, 332, which was an action for libel by the vicar of a parish against the publishers of "The Non-Conformist" which commented "with much freedom and severity" on his sermons, conduct and management, POLLOCK, C. B., said:

> "I think it quite right that all matters that are entirely of a public nature;—conduct of ministers, conduct of Judges—the proceedings of all persons who are responsible to the public at large, are deemed to be public property; and that all bona fide and honest remarks upon *such* persons, and their conduct, may be made with perfect freedom, and without being questioned too nicely for either truth or justice."

(We have quoted only a portion of a long paragraph, so as not to distract attention from

the point under discussion, but are quite sure that we have done the context no violence.)

In *Wason* v. *Walter*, L. R. 4 Q. B. 73, COCKBURN, *C. J.*, said at page 93:

> "The full liberty of public writers to comment on the conduct and motives of public men has only in very recent times been recognized. Comments on government, on ministers and officers of state, on members of both houses of parliament, on judges and other public functionaries, are now made every day, which half a century ago would have been the subject of actions or *ex officio* informations, and would have brought down fine and imprisonment on publishers and authors. Yet who can doubt that the public are gainers by the change, and that, though injustice may often be done, and though public men may often have to smart under the keen sense of wrong inflicted by hostile criticism, the nation profits by public opinion being thus freely brought to bear on the discharge of public duties?"

In *McLeod* v. *St. Aubyn*, (1899) A. C. 549, 561, 81 L. T. R., 158, 161, before the Judicial Committee of the Privy Council Lord MORRIS speaking of a newspaper attack on the acting Chief Justice of St. Vincent, said:

> "Committals for contempt of Court by scandalising the Court itself have become obsolete in this country. Courts are satisfied to leave to public opinion attacks or comments derogatory or scandalous to them."

It is true that in the Toledo Newspaper Company case, *Toledo Newspaper Co.* v. *U. S.*, 247 U. S., 402, the Court punished the defendants for newspaper publications, but only upon the ground that they actually tend to obstruct justice, in a matter then *sub judice*. That was an extreme case where the newspapers' continuous and protracted

attacks well nigh stopped the wheels of justice, inciting the public to defy the Court while deliberating over the cause before it. It marks the point at which the Court will stop, since the trend of public thought, which has found expression as a development of the law, is against punishment for contempt, in a summary way, arising out of public utterances. Nor will it do to say that the Court will punish as for a contempt what is usually termed an abuse of freedom of expression, sometimes termed license, for there are other ways of punishing license, as by an indictment of a grand jury and criminal trial or by civil suit for libel—remedies that are usually overlooked in a discussion of the subject. But we need not go to those lengths here, for neither the letter itself, rightly understood, as we contend, nor the meaning of it as given by the petitioner under oath, shows the slightest disrespect for the Court, much less "scandalising the Court" or a desire to "obstruct."

Had there been added to the words of the letter, which reads as follows:

> "• • • denying to myself and other members of the Board of Estimate and Apportionment any access to original sources of information concerning the property and affairs of these various public-utility corporations holding franchises to operate in the streets of New York"

these words:

> *by refusing to appoint the nominee of the Board as co-receiver,*

there would have been no possibility of misconstruction, and yet that is exactly what the context of the letter shows that he meant, and what the Comptroller, himself, testified that he meant.

We have refrained from repeating under this point, the luminous testimony of the Comptroller

giving his own meaning of the several paragraphs of the letter (pages 599-604, fols. 1797-1812; page 611, fol. 1832; page 612, fol. 1835; pages 665-668, fols. 1995-2002; pages 669-670, fols. 2006-2010; pages 691-693, fols. 2073-2077), which is wholly consistent with the wording of the letter and is the natural meaning that would be ascribed to it by an ordinary reader without straining any part of it from its context.

In so ordinary a book as the smallest edition of Webster's Dictionary the word "denial" has the significance of "non-compliance," which is the sense that the context shows that the Comptroller used the words "denying to myself and other members * * * any access to original sources of information," in connection with the refusal of the Court to grant the application for a co-receiver.

We cannot do better, we believe, than to quote from a high authority on the use of our language, as follows:

> "In this particular instance the issue between Judge Mayer and Comptroller Craig *is really one of terminology or of interpretation.* The Judge had refused to make Mr. Craig a co-receiver of the B. R. T. The Comptroller regarded that as denying the city access to first-hand information about the B. R. T. conditions. He so characterized it. Whether the characterization was accurate or not is one of the points yet to be determined." (Editorial in *Brooklyn Daily Eagle*, February 25, 1921.)

The right of free criticism of judicial acts has been recognized by high authority, which seems clearly to remove it from the realm of "Misbehavior." President Roosevelt, in his message to Congress, in December, 1906, said:

> "The judge has a power over which no review can be exercised; he himself sits in review

upon the acts of both the executive and legislative branches of the Government; save in the most extraordinary cases he is amenable only at the bar of public opinion; and it is unwise to maintain that public opinion in reference to a man with such power shall neither be expressed nor led.

"The best judges have ever been foremost to disclaim any immunity from criticism. This has been true since the days of the great English Lord Chancellor Parker, who said: 'Let all people be at liberty to know what I found my judgment upon; that, so when I have given it in any cause, others may be at liberty to judge of *me*.' The proprieties of the case were set forth with singular clearness and good temper by Judge W. H. Taft, when a United States Circuit Judge, eleven years ago, in 1895:

'The opportunity freely and publicly to criticize judicial action is of vastly more importance to the body politic than the immunity of courts and judges from unjust aspersions and attack. Nothing tends more to render judges careful in their decisions and anxiously solicitous to do exact justice than the consciousness that every act of theirs is to be subjected to the intelligent scrutiny and candid criticism of their fellow-men. Such criticism is beneficial in proportion as it is fair, dispassionate, discriminating, and based on a knowledge of sound legal principles. The comments made by learned text writers and by the acute editors of the various law reviews upon judicial decisions are therefore highly useful. Such critics constitute more or less impartial tribunals of professional opinion before which each judgment is made to stand or fall on its merits, and thus exert a strong influence to secure uniformity of decision. But non-professional criticism also is by no means without its uses, even if accompanied, as it often is, by a direct attack upon the judicial fairness and motives of the occupants of the bench; for if the law is but the essence of common-sense, the protest of many average men may evidence a defect in a judi-

cial conclusion, though based on the nicest legal reasoning and profoundest learning. The two important elements of moral character in a judge are an earnest desire to reach a just conclusion and courage to enforce it. In so far as fear of public comment does not affect the courage of a judge, but only spurs him on to search his conscience and to reach the result which approves itself to his inmost heart, such comment serves a useful purpose. There are few men, whether they are judges for life or for a shorter term, who do not prefer to earn and hold the respect of all, and who can not be reached and made to pause and deliberate by hostile public criticism. In the case of judges having a life tenure, indeed, their very independence makes the right freely to comment on their decisions of greater importance, because it is the only practical and available instrument in the hands of a free people to keep such judges alive to the reasonable demands of those they serve.

'On the other hand, the danger of destroying the proper influence of judicial decisions by creating unfounded prejudices against the courts justifies and requires that unjust attacks shall be met and answered. Courts must ultimately rest their defence upon the inherent strength of the opinions they deliver as the ground for their conclusions and must trust to the calm and deliberate judgment of all the people as their best vindication.'

"There is one consideration which should be taken into account by the good people who carry a sound proposition to an excess in objecting to any criticism of a judge's decision. The instinct of the American people as a whole is sound in this matter. They will not subscribe to the doctrine that any public servant is to be above all criticism. If the best citizens, those most competent to express their judgment in such matters, and above all those belonging to the great and honorable profession of the bar so profoundly influential in American life, take the position that there

shall be no criticism of a judge under any circumstances, their view will not be accepted by the American people as a whole. In such event the people will turn to and tend to accept as justifiable, the intemperate and improper criticism uttered by unworthy agitators. Surely it is a misfortune to leave to such critics a function, right in itself, which they are certain to abuse. Just and temperate criticism, when necessary, is a safeguard against the acceptance by the people as a whole of that intemperate antagonism toward the judiciary which must be combated by every right-thinking man, and which, if it became widespread among the people at large, would constitute a dire menace to the Republic."

Congressional Record, Fifty-ninth Congress, Second Session, pages 23-24.

A construction that prevents the free criticism of an act of the Court performed in one year or another during the course of years that the receivership might run and until the subject matter had ceased to be of any public interest would be a moratorium on public comment.

B. There was no *"obstruction,"* because there was "No Pending Judicial Determination," and none was imminent. Even though the Court be of opinion that the letter of October 6, 1919, was not absolutely privileged, as we contend it was, we submit that under the cases cited, *supra,* the letter did not tend to affect the administration of justice, in that it could not possibly influence any decision, for none was pending or imminent. The orders, policy and refusal had been made and taken nine months prior to the letter and were so far in the background that even an unprivileged, hostile communication thereon could not impinge on the statute, Sec. 268 of the Judicial Code, so as to give the Court jurisdiction to entertain contempt proceedings against the author on the ground that the act was misbehavior which tended to "obstruct the administration of justice." The Court's action was complete in respect of the matters which had occupied its deliberations and, being complete, the criticism of it followed lawfully.

No act of obstruction was specified or defined in the Information or found by the conviction.

The Information set forth four respects in which it was alleged that the letter was *false,* numbered definitely 1, 2, 3 and 4.

The conviction was for "contempt of this Court *in respect of* the matters set forth in paragraphs 1, 2, 3 and 4 of the Information" (Record, fols. 2512-2516, pp. 838-839), all of which related to criticism of acts wholly past (vide Information, Record, fols. 168-174, pp. 56-58).

An inspection of the original order of Judge MAYER on file in the District Court (filed on the 23d day of February, 1921) will show that Judge MAYER wrote into the order by his own hand the words: "in respect of the matters set forth in" preceding the typewritten words: "paragraphs num-

bered 1, 2, 3 and 4 of the information herein," thus showing that he deliberately intended to confine the alleged contempt to the criticism of past acts which, alone, are set forth in the paragraphs of the Information thus specified.

We submit that the legal meaning of the conviction is that the petitioner was guilty of making four false statements respecting acts of the Court, long past, nothing more. "In respect of" means in common parlance "for" or "only for."

The general conclusion that he was guilty of contempt of court, in respect of those acts, added nothing to the alleged offense, which was simply that he had written falsely of the Court's past acts. No connection is disclosed between the alleged falsehoods and any matter then pending or imminent.

It is impossible to find any connection between the falsehoods as to the past and any present or future act of the Court, or any discernible obstruction or tendency to obstruct.

There was no adjudication embracing that portion of the letter referring to a "reversal of policy," for the reasons, no doubt, set forth at fols. 2006-2018, 2078, 2079.

The judgment does not furnish legal basis for the sentence, because it defines, and thereby limits its operation to past acts without the scope of the statute.

> "The question then arises, *whether the facts recited in the final order in the District Court as constituting the contempt*—which facts must be taken in this collateral proceeding to be true—*make a case of misbehavior* in the presence of the court, or misbehavior so near thereto as to obstruct the administration of justice therein" (italics ours).
>
> *Savin, Petitioner,* 131 U. S. 267, 276.

In the case at bar the facts recited in the final

order, limited solely to past acts, do not make a case of obstructive misbehavior.

The judgment shows upon its face affirmatively that no judicial duty was in process.

As the alleged contemptuous acts were expressly limited by the form of the judgment, no presumption of the existence of other facts in support of the jurisdiction will be indulged.

In *Galpin* v. *Page*, 18 Wallace (85 U. S.), 350, Mr. Justice FIELD, delivering the opinion of the Court, said at page 366:

> "But the presumptions, which the law implies in support of the judgments of superior courts of general jurisdiction, only arise with respect to jurisdictional facts concerning which the record is silent. Presumptions are only indulged to supply the absence of evidence or averments respecting the facts presumed. They have no place for consideration when the evidence is disclosed or the averment is made. When, therefore, the record states the evidence or makes an averment with reference to a jurisdictional fact, it will be understood to speak the truth on that point, and it will not be presumed that there was other or different evidence respecting the fact, or that the fact was otherwise than as averred. If, for example, it appears from the return of the officer or the proof of service contained in the record, that the summons was served at a particular place, and there is no averment of any other service, it will not be presumed that service was also made at another and different place; or if it appear in like manner that the service was made upon a person other than the defendant, it will not be presumed, in the silence of the record, that it was made upon the defendant also. Were not this so it would never be possible to attack collaterally the judgment of a superior court, although a want of jurisdiction might be apparent upon its face; the answer to the attack would always be that, notwithstanding the evidence or the

averment, the necessary facts to support the judgment are presumed."

The Comptroller was held guilty of telling falsehoods out of Court. In the *Hudgings* case, *supra*, the defendant was found guilty of telling falsehoods in Court. In each instance the falsehoods lacked an obstructive characteristic.

The obstructive effect must really exist. "The *presence* of that element must *clearly be shown* in every case where the power to punish for contempt is exerted," as was said in the *Hudgings* case, *supra*.

Application had been made under express direction of the Board of Estimate and Apportionment for the appointment of a co-receiver in behalf of the City of New York in the railway controversy. That application had been denied and disposed of on the 22d day of January, 1919 (Record, page 1073, fol. 3219), long before the letter of October 6, 1919, was written. The Court had intimated that it might be renewed (Record, page 47, fols. 139-141), but it had not been renewed, and the receivership had been made permanent (Record, pages 1068-1072).

It is not claimed that any determination was pending or imminent.

The return to the writ of habeas corpus has settled this for all time. From paragraph Fourth of the Return, we quote (fols. 2526-2527):

> "On October 6, 1919, *there was not pending awaiting decision any order or judicial determination* mentioned in the letter of that date from the petitioner to Lewis Nixon set forth in the Information, but the same was *still within the control* of the District Court of the United States for the Southern District of New York *and subject to change.*"

We submit that, if it were possible under the system of pleading in a habeas corpus proceeding,

the petitioner might have been discharged upon that admission in the return, standing alone.

The majority judges of the Court below, however, did not in either opinion refer to this important concession.

Of course, the whole railroad situation was before Judge MAYER, but it was before him wholly in an administrative capacity; "there was not pending awaiting decision any order or judicial determination" in the language of the return.

We emphasize that it was only within the control of the Court and subject to change *if* the Court *were moved thereto* by some person. We know of no ambulatory jurisdiction of a Court that would allow the Court to change its decisions or orders without being moved thereto by a party in interest.

The Court below did not in either opinion place any importance on the assertion in the Return that the matter was still within the control of the Court and subject to change, but it may be well to look at what another Court has regarded as pending.

As to what constitutes a subject-matter pending *sub judice*, was considered in *Metzler* v. *Gounod*, 30 L. T. R. N. S. 264, Court of Common Pleas, before KEATING, BRETT and DENMAN, *JJ.* There was a motion for a rule to show cause why an attachment should not issue against Mrs. Georgina Weldon for contempt of Court for circulating at a concert printed statements which were said to give a grossly unfair statement of the facts at a trial "at variance with those which had been sworn to." The trial had taken place, but the defendant had leave to move for a non-suit or new trial on technical grounds. It appears by the report of the case that during the argument Judge KEATING asked the following suggestive question:

> "Is not this contingent contempt? There was no trial pending."

In delivering the opinion of the Court, KEATING, *J.*, said:

> "I think there is no ground whatever for this application. It is, of course, most desirable and necessary that nothing should be done to prevent a fair trial being had when parties are once before the Court and the decision of the disputed question is still pending. The Court should be protected against any bias being created by proceedings outside, which might prejudice the litigants who are availing themselves of its process. But there is nothing of the sort here. The trial had taken place and the plaintiff had obtained a verdict and the defendant had leave to move for a non-suit or a new trial on technical grounds. The motion may or may not be made; the time has not expired; but it does not matter whether it is made or not, nothing is now pending before the Court," etc.

We know of no right in a Court to have its decree and orders subject to change without being moved thereto by a party, and such a move by a party is what the Comptroller intended to accomplish by his letter. He intended to move *the parties thereto* to bring about some change. This cannot be made too clear. He intended to make no impression upon Judge MAYER.

He testified that that was his position (Record, fols. 1818-1824); and that the disclosure of the letter, before the newspaper men got hold of it, was furthest from his mind. Quoting his testimony on this point, we find:

> "The last thing on earth that had ever entered my head was that Mr. Nixon would be so foolish as to read that letter to the railroad attorneys that he had to negotiate with" (Record, fol. 1818).

Regardless of his testimony, the letter shows upon its face that his intention was that "As a first and

preliminary evidence of good faith, *those who desire* such a conference and a reasonable solution of existing complications, *should procure* the entry of orders by Judge MAYER putting the City of New York on an equal footing with the private interests active in the receiverships" (Record, fol. 2208). That shows distinctly that the impression he intended to make was upon the representatives of the railways, through Mr. NIXON, if the latter were to agree with him.

In the case of *Patterson* v. *Colorado,* 205 U. S., 454, Mr. Justice HOLMES, in delivering the opinion of the Court, said at page 463:

> "When a case is finished, the courts are subject to the same criticism as other people, but the propriety and necessity of preventing interference with the course of justice by premature statement, argument or intimidation hardly can be denied."

The import of the statute is defined in the statement of its purpose in the opinion of Chief Justice WHITE in the *Toledo* case, 247 U. S., pp. 402, 419, where he said:

> "The provision, therefore, conformably to the whole history of the country, not minimizing the constitutional limitations nor restricting or qualifying the powers granted by necessary implication, recognized and sanctioned the existence of the right of self-preservation, that is, the power to restrain acts *tending to obstruct and prevent the untrammeled and unprejudiced exercise of the judicial power* given by summarily treating such acts as a contempt and punishing accordingly. *The test, therefore, is the character of the act done and its direct tendency to prevent and obstruct the discharge of judicial duty—a conclusion which necessarily sustains the view of the statute taken by the courts below* * * *." (Italics ours.)

The view taken by the lower courts in the *Toledo* case may be summarized as follows:

In *Toledo Newspaper Co.* v. *United States*, 237 Fed. Rep., 986, 990 (C. C. A.), Judge DENISON said:

> "Upon this record, the publications had reference to *pending judicial action*, and there is a finding of fact ('as alleged in the information') that they tended and were intended to provoke public resistance to an injunctional order, *if one should be made*, and there is a finding that they constituted an attempt to intimidate—*at least unduly to influence*—the District Judge *with reference to his decision in the matter pending before him.*" (Italics ours.)

The above quotation from the opinion of Judge DENISON is cited with approval in the opinion of Chief Justice WHITE in the *Toledo* case in this Court, 247 U. S., 402, at page 415.

In the same case in the District Court, *United States* v. *Toledo Newspaper Co.*, 220 Fed. Rep., 458, Judge KILLITS said, at page 503:

> "Unless a publication plainly tends to affect the administration of a pending case, our conception of Section 268 requires that it be not considered a *misbehavior*, no matter how aggravating or unfair it may be."

A close study of the record in that case shows that: There were three matters then pending before Judge KILLITS awaiting decision, each unrelated, and they were as follows:

(a) An injunction had been applied for and had not yet been granted, Judge KILLITS announcing from the bench that he would have to consider whether the Court had jurisdiction to issue the injunction.

(b) As soon as that happened, this being a big railroad fight and the question being whether the

rate of fare should be three or five cents, one Quinlivan started to harangue the people on the afternoon of the day of Judge KILLITS' announcement and advised them that they should not pay any fares but ride on the cars free. In fact they did so. Judge KILLITS forthwith issued an attachment for him to show cause why he should not be punished for contempt. So that matter was a pending matter.

(c) As soon as the attachment was issued, the newspaper started a great hubbub about Quinlivan and the Judge, and what was going to happen. As soon as that occurred, the Judge issued an attachment against Howard, the managing editor. So that was pending.

(d) With those *three proceedings pending* in the Court *sub judice*, the most violent attack of all came, and it was because of these attacks made upon him, while those three matters were under consideration, that Judge KILLITS came to the conclusion above noted.

The Circuit Court of Appeals, in its opinion, referring to this phase (237 Fed. Rep., at p. 988), said:

> "It is undisputed that the newspaper publications had reference to the general subject-matter, *some phases of which were then pending in the District Court*, and had reference to the making and effect of the injunctional order, *the application for which was then pending.* * * * There was ample jurisdiction to justify punishing any contempt committed at this stage of the case." (Italics ours.)

The isolated criticism in this case bears no comparison with the extreme obstruction shown in the Toledo case, and yet Judge HOUGH in his concurring opinion in the Court below in the case at bar said:

> "We are bound to consider no more than the single question, whether such conduct with such intent could in point of law obstruct the administration of justice. It is my opinion that this question is answered in the affirmative by *Toledo, etc. Co.* v. *United States* (*supra*)" (Record, p. 1162, fol. 3484).

The learned judge did not, however, point out any respect in which the facts were proximate.

In order to give jurisdiction there must be an impact, physical or verbal, which tends to obstruct the delivery of justice.

In the *Toledo* case, the matters commented on were "in the bosom of the Court."

There must be a verbal or physical obstruction placed in the way of the Judge to actually prevent him from delivering or to influence him in delivering justice. Hence, when we come to apply the above principles of law to the case at bar, we find that the letter of the defendant dated October 6, 1919, signed by him in his official capacity as "Comptroller," and "in response to the invitation" (Record, fols. 155-156), set out in full in the Information, refers in its own plain terms, in every instance specified, *to past action taken by District Judge* MAYER *in regard to matters which had arisen in the suits and proceedings in the Court.* The letter does not concern itself, on its face, with any pending matter in such suits or proceedings. It is true that the letter does say that "as a first and preliminary evidence of good faith, *those who desire* such a *conference* and a reasonable solution of existing complications, *should procure* the entry of orders by Judge MAYER putting The City of New York on an equal footing with the private interests active in the receiverships" (Record, fol. 2208). That, however, was a condition precedent to official,

not judicial, action; it related to a possible conference of non-judicial officials, not to any pending or imminent decision by the Court. The conviction fails to predicate guilt upon that specific statement, but on the contrary confines the contempt to the alleged false statements "in paragraphs 1, 2, 3 and 4."

The Information does state that two suits and a proceeding are, and, during all the times thereinafter mentioned subsequent to the respective dates of their commencement, as thereinafter stated, had been pending in the District Court of the United States for the Southern District of New York. But nowhere in the Information is it alleged or stated that, at the time when it is charged that the defendant Comptroller wrote the letter to Lewis Nixon, Public Service Commissioner, there was pending before the District Court for deliberation or determination by Judge MAYER any motion or proceeding of any kind in either of the suits or proceedings, and the Return to the writ expressly admits that none such was pending. The abortive effort, by the voluminous court records put in evidence by the prosecuting attorney (Record, pp. 889-1128, fols. 2667-3383), to give the semblance of a pending determination, accentuates its absence. All of the opinions and acts set out in the Information were, at the time the defendant *Comptroller* wrote the letter, past acts, as to which the publication of the letter *could not constitute misbehavior tending to obstruct the administration of justice* within the purview of Section 268 of the Judicial Code, "no matter how aggravating or unfair it (the letter) may be," to use the phrase of Judge KILLITS (quoted *supra*). It is a matter of no consequence that the Information characterizes the letter as false, and as having been written wilfully, knowingly, unlawfully and contemptuously, because

there was no obstruction or no possible obstruction to the actual delivery of justice.

MORE THAN THE SEMBLANCE OF A CONTEMPT IS REQUISITE TO CREATE JURISDICTION IN THE COURT OF FIRST INSTANCE.

The criticism of a judicial act, long past, was no more than a *semblance of a contempt*. Its statement in the information was not of a crime, but of the mere ghost of a crime. The prosecuting attorney has argued, in effect, and the court below has said in effect, that if a crime be charged the only remedy is by demurrer and review on appeal; but, if only a semblance of a crime be shadowed forth in the Information, the Court cannot lay hold of it and assert jurisdiction thereby. It is too intangible to create even a pretense of jurisdiction. "Any other reasoning or rule would clothe a court or judge with absolute and unlimited power where it had jurisdiction of the subject matter of an action and of the person to imprison whosoever it pleased, and beyond the remedy of discharge on habeas corpus (Bailey on Habeas Corpus, Vol. 1, p. 271).

In *Matter of Gregory*, 219 U. S., 210, cited to support the prevailing opinion in the Circuit Court of Appeals below, this Court clearly recognized the distinction between colorable jurisdiction and jurisdiction of the inferior court when questioned on habeas corpus.

Mr. Justice HUGHES said (at p. 217): "But it is insisted that the facts do not support the conviction. The argument ignores the nature of this proceeding, *unless it be meant that no colorable question was presented;* that on the agreed statement of facts and viewing the statute as prohibiting transactions involving the element of chance, *there was such an obvious and palpable want of criminality that the judicial judgment cannot be said to have been invoked,* and that *therefore* the

court had *no jurisdiction* to determine whether or not the statute had been violated * * * Given a valid enactment, the question (*assuming it to be one demanding judicial examination*) whether a particular case falls within the prohibition is for the determination of the Court to which has been confided jurisdiction over the class of offenses to which the statute relates" (Our italics).

We do contend that " no colorable question was presented" and that "there was such an obvious and palpable want of criminality that the judicial judgment cannot be said to have been invoked" by the criticism of judicial acts wholly past, and that there was and is no ground for "assuming it to be one demanding judicial examination."

In *Windsor* v. *McVeigh*, 93 U. S. 274, it was said at page 282:

> "The doctrine invoked by counsel, that, where a court has once acquired jurisdiction, it has a right to decide every question which arises in the cause, and its judgment, however erroneous, cannot be collaterally assailed, is undoubtedly correct as a general proposition, but, like all general propositions, is subject to many qualifications in its application. All courts, even the highest, are more or less limited in their jurisdiction; they are limited to particular classes of actions, such as civil or criminal; or to particular modes of administering relief, such as legal or equitable; or to transactions of a special character, such as arise on navigable waters, or relate to the testamentary disposition of estates; or to the use of particular process in the enforcement of their judgments. Though the court may possess jurisdiction of a cause, of the subject matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. *It must act judicially in all things, and cannot then transcend the power conferred by the law.* If, for instance, the ac-

tion be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and parties has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for a libel or personal tort, the court cannot order in the case a specific performance of a contract. If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will. Instances of this kind show that the general doctrine stated by counsel is subject to many qualifications. The judgments mentioned, given in the cases supposed, would not be merely erroneous; they would be absolutely void; because the court in rendering them would transcend the limits of its authority in those cases. See the language of Mr. Justice MILLER, to the same purport, in the case of *Ex parte Lange*, 18 Wall. 163. So it was held by this court in *Bigelow* v. *Forrest*, 9 id. 351, that a judgment in a confiscation case, condemning the fee of the property, was void for the remainder, after the termination of the life-estate of the owner. To the objection that the decree was conclusive that the entire fee was confiscated, Mr. Justice STRONG, speaking the unanimous opinion of the court, replied: 'Doubtless a decree of a court, having jurisdiction to make the decree, cannot be impeached collaterally; but, under the act of Congress, the District Court had no power to order a sale which should confer upon the purchaser rights outlasting the life of French Forrest (the owner). Had it done so, it would have transcended its jurisdiction.' Id. 350.

* * * * * * * *

"The doctrine stated by counsel is only correct when the court proceeds, after acquiring jurisdiction of the cause, according to the established modes governing the class to which the case belongs, *and does not transcend, in the extent or character of its judgment, the law which is applicable to it.* The statement of the doctrine by Mr. Justice SWAYNE, in the case of *Cornell* v. *Williams*, reported in the 20th of

> *Wallace,* is more accurate. 'The jurisdiction,' says the justice, 'having attached in the case, everything done *within the power of that jurisdiction,* when collaterally questioned, is held conclusive of the rights of the parties, unless impeached for fraud.' 20 Wall. 250."

As was said by Judge HAND in his dissenting opinion below: "In the somewhat analogous case of obstructing the draft, the Supreme Court laid down the rule that the words must constitute 'clear and present danger' that the evil will result," citing *Schenck* v. *United States,* 249 U. S., 47, 52 (Record page 1171, fol. 3513).

With the greatest respect we submit that the office of Charles L. Craig, Comptroller of this City, both in his capacity as Comptroller and as a member of the Board of Estimate and Apportionment, an elected officer of the people, is important and needful, is hedged around with dignity and circumstance, just as the office of a Judge, and in the performance of his duty he must proceed fearlessly and untrammeled.

In the situation in which Mr. Craig found himself, he was not only proceeding along the lines of his duty, but he was led into making the expression which he did. In other words, the Public Service Commissioner was sitting there at a conference which the counsel for the Receivers had been directed to attend by the Judge (fols. 1112-1113) who was in control of the proceeding. Mr. Craig was invited — — an invitation in which the Court participated by directing its representative to attend — — so that in being asked to go to that meeting, and in answering the invitation it was as though the comptroller had been asked by the Court to act and *speak* freely. Why should the Comptroller be punished for *writing* freely in such a situation?

This conference was actually in the course of being holden, when the Comptroller's letter was physically delivered into Mr. Nixon's hand, as he sat upon the dais of the Public Service Commission room. So the matter was hedged about with every circumstance of officialdom that can possibly be conceived of (fols. 397-399).

The ordinary official method of performing matters of duty in the office of such an official as the Comptroller is by letter or written communication. The legislator speaks on his feet or acts in a committee; the Judge writes an opinion or delivers a charge, but when an official, such as the Comptroller of the City of New York, has an official duty to perform, his method of communication is, normally and naturally, that of a letter or a communication in that form. So we submit in every respect this was an official communication, by an official to an official.

He responded in writing because he could not respond in person, for, as appears on the face of the document, he was otherwise engaged with weighty public matters. The purpose of the communication was to make plain that he would not and could not, in justice to himself, or to those whom he represented, sit down and consider with the representatives of the railway interests, with a mind unilluminated by information from original sources, the subject matter to which his attention had been directed. The theme, the keynote, the ultimate stroke of the communication is that he would not sit down until he had that information from original sources, and that it was within the power and within the opportunity *of the persons with whom he was asked to sit down* to place him in possession of, or in a position where he might have that information, by an application on their part to the court for a reversal of the policy which

had entrenched them with information from original sources and which he, mistakenly or otherwise, felt that he had to possess, but which he stoutly affirmed that he did not possess. No one can draw any other meaning from the communication. That was its object; that was its purpose; that was its plain distinct affirmation. In other words he said, translated into the vernacular, that he would not sit at the table with the representatives of the railway interests, while they had their firearms with them, as he had not his. The communication is addressed to the attitude of his opponents, and was in no sense addressed to nor intended to reflect in the slightest degree upon the court. He criticised the result of the application for a co-receiver, as everyone criticises a result in a court of law, who does not completely accept it.

No one pretends but that in this receivership, as in most receiverships, where all of the parties have assented, the parties adopt a policy, and the court becomes responsible for that policy when it makes its orders and decrees in conformity therewith. No wrong is thereby imputed, but much criticism is usually evoked.

Traction difficulties in every large city are more prolific than any other subject of pointed and harsh criticism, for the obvious reason that the public must suffer and endure daily the inconvenience and disgruntlement—they must walk, or stand or talk, and they usually talk, and their elected officials talk with them or against them—there is no calm or dispassionate theorizing in the face of a traffic upheaval. The public officials have a policy—or, as is sometimes charged, have no policy. They must stand criticism. And the Courts who shape or adopt a policy in running the railroads ought not to be beyond criticism.

The letter, as a whole, shows that the Comptroller had made application, at the direction of the Board of Estimate and Apportionment of the City of New York, for appointment as a co-receiver, to serve without compensation, for the purpose of having access to original sources, and that Judge MAYER in the proceedings had held there was no need or occasion, at that time at least, for the appointment of a co-receiver. All that Judge MAYER had done is co-extensive with all that the Comptroller urged, on the other side, had been denied to him, according to his theory or his construction, viz., that while *information* was directed to be given, *access* to original sources had not been provided, and in effect had been denied, by the refusal to appoint the City's representative as co-receiver. The insistence of the Comptroller was that he wanted information from original sources and he wanted that information as a matter of right not as a matter of mere information or favor from the files, pursuant to directions to the receiver; he wanted access to evidence, such as a co-receiver would be able to get, not information doled out. No one, under any direction that he gets from a court to be afforded information from the records or files of a great railway system, could ever succeed in getting complete or reliable knowledge, upon which to act officially, unless he had an equal opportunity, through possession of the records, to examine and to delve into and to go down to the bottom. That is common knowledge, of which the Courts take notice. But regardless of common knowledge, that was the Comptroller's honest belief, mistaken or otherwise. As an illustration, we know that in the ordinary search for evidence, even where an order for examination of a party before trial is made, the pursuit is usually paralyzed unless it is aided by an order for discovery and inspection, and a man

is baffled at every turn, by those who do not know the facts at first hand or by those who, having possession of the documents and papers for years and years back, have either suppressed the information or paralyzed the arm of the court, so that the court itself shall not get at the facts. What was taking place in the City of New York at the time was naturally in the mind of the Comptroller. An investigation was afoot of the rights, obligations and relations of these inter-allied and inter-related railway companies which were applying directly or indirectly to the public conscience of a public body of which he was a member for relief of one kind or another.

It is clear to anyone reading this letter that the difference between Judge MAYER'S direction as to the publicity of these records and that of the writer of the letter was, that Judge MAYER felt and thought that the receiver and those acting under him, and upon whom he was depending, were going to be as honest and open with the Comptroller of the City of New York and the Board of Estimate and Apportionment as though there was no interest adverse to the City.

The Comptroller had taken a position which with him was a conviction—an obsession, if you like—that he could only get access to original sources by his appointment as co-receiver; and, on the other hand, there was the Court who had directed these books to be thrown open, and who felt that by the throwing open of those books that all information that anyone could need or want was accessible to the public. These are the two different views, considered from the standpoint of two different persons —one, the Court, and the other, the Comptroller.

It would have been a sort or kind of presentation of this matter if the Comptroller had written in this letter the precise things that the Court had

done, and if he had then concluded with the statement that, notwithstanding what the Court had done, the court had still failed to realize or appreciate what he, the Comptroller, mistakenly or otherwise, thought should have been and should be done. The letter might have been written in that way, and would have been as truthful as one could want, and it is, perhaps, a regrettable circumstance that it was not written in that way, but a regrettable circumstance constitutes no sufficient ground of prosecution for contempt.

While it needed no testimony to make plain the meaning of the letter, the Comptroller testified that when he charged that he had been denied access to original sources of information he meant that he had been denied the right to go through or to dig down into these sources of information which alone would be useful to him in the discharge of his duties as Comptroller; that without that he could not proceed; that his official judgment and his official conscience could not be moved until he had had access to the original sources of information (fols. 1833-1835).

He was familiar, because he was a lawyer, with the trivial results that flow from a polite request or even a general official direction addressed to a receiver of a corporation, and passed upon by some former officer or servant of the corporation who has been retained in the service of the receiver; and he knew the futility of such a thing.

THE STATEMENT THAT THE COURT HAD DENIED ACCESS TO ORIGINAL SOURCES OF INFORMATION WAS NOT TANTAMOUNT TO A CHARGE OF MISCONDUCT, BECAUSE NEITHER THE PUBLIC NOR THE COMPTROLLER WAS A PARTY TO THE PROCEEDINGS, NOR ENTITLED, AS SUCH, TO THE ACCESS AS MATTER OF RIGHT.

Although the public and its officials were concerned to a vast extent in the rapid transit situa-

tion, they were not interested, in the strict or proper sense, in the litigation, because they were not parties, and, therefore, were not entitled as matter of right to access to original sources. The charged denial of that opportunity was, therefore, not a charge that justice had been denied, nor any imputation upon the honor or integrity of the Judge, but rather that the Judge had not effectively secured the paramount interests of the public, as the Comptroller conceived them to be.

The Court had concluded that the interests or voice of the public, as expressed in the application for the appointment of the co-receiver, were not paramount to or co-extensive with the rights of the parties, in the sense that the people were not entitled to have representation then through a co-receiver. Or possibly the Court felt that the Board of Estimate was not entitled to voice the wishes of the public, or that some other official or body was solely entitled to speak for the public, or that the Court understood better what was needed and proper. Anyway, the court had held that the public was not then entitled to representation in the receivership. The public was not a party.

If the letter had charged that the Court had denied access to John Doe, who was not a party, or to a million John Does, who were not parties, no one would have given even a passing thought to the charge, and yet that is what the charge or criticism amounts to and nothing more.

If the Judge had not been charged with denying to the *public* officials access, no one would have thought for an instant of instituting this proceeding.

But public officers—no less those who are appointed than those who are elected—are sensitive, and rightly so, to the slightest suggestion that they have denied the wishes of the public, and yet it has

been not only the duty but the opportunity of great judges to deny the wishes of the public, however, or by whomsoever expressed, on momentous occasions.

It appears that when the letter was delivered into the hands of the Commissioner, one of the counsel for the receivers, said that the letter was false, and actually asked that a copy of it be delivered into his hand, went forthwith to the chambers of Judge MAYER and rubbed the letter under the eyes of the judge and said, in effect, to him, or someone else in his presence (fols. 1174-1177): I wish to call your attention to the fact that this false letter has been written. Judge MAYER in his opinion wrote of the human desire entertained as much by judges as by others for the good will and confidence of the community (fol. 2490), but in conclusion said, "It is not a wrong with which the judge concerns himself in a personal sense" (fol. 2509). No human being could have a word or communication presented to him under these circumstances, official or otherwise, with the statement that it had been characterized as false with respect to him, who would not feel that he had been affronted.

The Court was acting in an administrative or ministerial capacity, not in a strictly judicial character. Criticism of, or even an imputation against acts done in an administrative capacity does not constitute contempt.

The Judge before whom the receivership proceedings were pending, himself, had characterized his relation to the proceeding as administrative (Ex. 42, at fols. 3164-3165).

The theme of the letter relates to *administration* of the receivership and the policy with respect thereto, language which is exclusive of purely judicial functions.

Where the Judge is acting in an administrative or ministerial capacity, criticism of his acts is not

a criticism of or interference with the Court, of such a character as to sustain a charge of contempt.

A judicial proceeding is the decision of a controversy between parties, and there the Judge acts as the representative of justice. It is out of such a situation that the theory of contempt was born. But the receivership and all of its incidents, though in form judicial, was really administrative; it was on questions concerning the administration of property, in large sense, that the alleged contempt arose The information shows on its face that the Judge was engaged, practically, in administering a vast property in which the public was concerned. Questions of general policy, of detail, of public interest were necessarily involved.

In the opinion of ROGERS, *C. J.*, below, he refers to the fact that an opportunity was given to the petitioner to make a retraction (fol. 3408, p. 1136). Vide fol. 2510, p. 837. Long before that the petitioner after fully setting forth all of the surrounding circumstances of the writing of the letter, had testified as follows:

> "Q. Now, in writing this letter did you have any intention whatever of a contemptuous act toward Judge Mayer? A. Certainly not. Let me add, I had, as I said this morning, an intention, and the only intention I had was to get into the mind of Lewis Nixon a state of facts which he could verify at any stage from various sources, and which once he had in mind would impel him to follow out the suggestion I embodied in the letter; so that there could be freedom of discussion and a solution of these difficulties.
>
> "Q. Now I will put the question impersonally: In writing this letter, did you have any intention to commit any contemptuous act toward the Court? A. I did not.
>
> "Q. Did you have any intention to charge any misconduct, ignominy or wrongful conduct

of any kind or character toward Judge Mayer, or toward the Court? A. No. (Record, fols. 2017, 2018, p. 673.)

Riddle v. *Dyche,* decided by this Court May 21, 1923, but not yet officially reported, United States Supreme Court Advance Opinions, 1922-23, 67 L. Ed. 612 (June 15, 1923), in no way restricts such an inquiry into the jurisdiction as we contend for. In that case an attempt was made to show the contrary of a matter expressly determined in the record. In the case at bar the petitioner alleged and showed facts "not inconsistent with the record" which overcame any presumption in favor of the District Court on the jurisdictional points involved, especially in view of the qualified findings in the record and the limited scope of the offending as declared (Record, pages 838-839, fols. 2514-2515).

Because, therefore, of the limited scope of the facts appearing on the face of the Information itself, as restricted to criticism of past acts, and in the conviction, coupled with the express admission in the Return to writ, the Court, being limited in its power to punish for obstruction, acted in excess of its powers, and the proper relief was by habeas corpus, as appears in Point VIII, *infra.*

POINT III

The Circuit Judge had jurisdictional authority to issue the writ of Habeas Corpus.

If the circuit judges have not now the jurisdictional authority to issue writs of habeas corpus, it is because their jurisdictional authority, which up to the passage of the Judicial Code indubitably existed, has been lost, not by the deliberately expressed will of Congress, but as an incidental and unintended result of an Act which sought merely

to merge into the District Courts the Circuit Courts, in which the circuit judges served, and which did not in terms deprive them of their power as judges.

Prior to the enactment of the Judicial Code, which merged the courts and vested the powers of the Circuit Courts in the District Courts, the circuit judges, as such, had jurisdictional power to issue the writ of habeas corpus, not only by virtue of the provisions of the Habeas Corpus Act (*Statutes of* 1867, *Chapter* 28, 14 *Statutes at Large* 385, *Feb.* 5, 1867), which was in effect when the Circuit Judges were first appointed and which gave the power to "the several courts of the United States and the several justices and judges of such courts," but by virtue, also, of the provisions that, when appointed, they were given, in the Circuit for which they were appointed, the "same power and jurisdiction therein as the justice of the Supreme Court allotted to the Circuit" (*Act of April* 10, 1869).

Clearly, the mere fact that a *court* is merged does not deprive the *judge,* whose office still continues, of any jurisdictional power vested in him, *qua* judge. By the Habeas Corpus Act of 1867 the jurisdictional authority to issue the writ was vested in the "several courts of the United States and the several justices and judges of such courts within their respective jurisdictions," and subsequently, on the appointment of Circuit Judges, by the Act of April 10, 1869, and the still later codification in the Revised Statutes, the jurisdictional authority to issue the writ was vested in "the Supreme Court and the Circuit and District Courts" (R. S., Sec. 751), and upon "the several justices and judges of the said courts" (R. S., Sec. 752), and again by Sections 754, 755, 757, 758, 760, 761, 762 and 763 the jurisdictional power of the justices and judges is repeated.

These justices and judges are described in the

Revised Statutes as "the several justices and judges of the said courts," but since they were in fact "Justices of the Supreme Court," and "circuit judges" and "district judges" this was but a short way of describing the officers in whom was vested the jurisdictional authority. The statute might as well have read, and, in the ordinary vernacular, would have read "the Justices of the Supreme Court, the circuit judges and the district judges," or "United States Judge," as in Section 6 of the Chinese Exclusion Act of 1892, or "Judge of the United States" as in Section 1014, Revised Statutes, which would have had the same meaning as the words actually employed.

The object and purpose of the applicable provisions of the Judicial Code were to get rid of superfluous courts, court officers and records, not to circumscribe the jurisdictional power of the judges. That was quite evidently not in the mind of the Congress at all. We undertake to say that if, while the Judicial Code was under consideration in the Senate, a member of that body had risen in his place and asked the Senator in charge of the bill whether it was intended by the proposed legislation to deprive the circuit judges of the jurisdictional authority which had theretofore been conferred upon them to issue writs of habeas corpus, a negative answer would have unhesitatingly been made.

These views are not out of harmony with the decision of this Court in the case of *Whitney* v. *Dick*, 202 U. S., 132; for there the question was as to whether *an additional jurisdictional power had been conferred* upon a new Court of Appeals, not whether a judge of the court had been deprived of any of the jurisdictional powers which he had theretofore exercised, *qua* judge.

The jurisdictional powers of the court and the jurisdictional powers of the judge are distinct. *U.*

S. v. *Clarke,* 1 Gall., 497, 499 (STORY, *J.*). To deprive the judge of his powers should require something more than a conclusion drawn from a drily literal application of language clearly intended to deal only with the courts, *qua* courts.

We feel that it may fairly be said that never in judicial history has a judge lost any of his jurisdictional powers by implication.

In questions of great moment, it had happened in the nation's history, and it will happen again where a person has been restrained of his liberty, that a judge of the District Court has not only felt but expressed his reluctance to interfere with the committing power of another judge of co-ordinate jurisdiction. (In this respect, see the opinion of Judge WALLACE, refusing to discharge a prisoner merely because a judge of co-ordinate jurisdiction had made the commitment, *In re Hale,* 139 Fed. 496, 504). If the opinion of the Court below stands, the district judges will be more loath than formerly to grant the writ. In such a case a circuit judge, who is aloof from a district judge, would doubtless more readily exercise the power, although it were in reality the identical power drawn from the Habeas Corpus Act. The only "other and appropriate sources of judicial power" (*Ex parte Tracy, petitioner,* 249 U. S., 551) are Justices of the Supreme Court and the Supreme Court itself, which should be relieved of such applications whenever possible.

The Constitution, Clause 2, Section 9, Article 1, provides that

> "The privilege of the writ of habeas corpus shall not be suspended unless when in cases of rebellion or invasion the public safety may require it."

The policy of the United States has been in the direction of extending and not of abridging the

advantages of the writ of habeas corpus. The Constitution provides:

> "the *privilege* of the writ * * * shall not be suspended * * *"

Under the English practice, the Habeas Corpus Act itself is suspended in time of war or other great exigency, the effect of which is to prevent the issuance of the writ, and not merely to suspend the privilege of the writ. Under our Constitution "The suspension of the privilege of the writ of habeas corpus does not suspend the writ itself. The writ issues as a matter of course; and on the return made to it the Court decides whether the party applying is denied the right of proceeding any further with it." *Ex parte Milligan,* 4 Wall., 2, 130-131.

This policy of maintaining and extending the efficacy of the writ is further evidenced by the Acts of Congress in conferring jurisdiction to issue it widely. Not only were the *Courts* given authority, but the same authority was conferred upon the individual *Justices* and *Judges* as well. All this is evidently out of tenderness for individual liberty.

The First Judiciary Act of September 24, 1789, Statutes at Large, Section 14, provided as follows:

> "Section 14. And be it further enacted, That all the before-mentioned courts of the United States (Supreme Court, Circuit Courts as then constituted and District Courts) shall have power to issue writs of scire facias, habeas corpus and all other writs * * * necessary for the exercise of their respective jurisdiction and agreeable to the principles and usages of law. And that either of the *justices* of the Supreme Court, as well as *judges* of the district courts shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment."

There was then no Circuit Judge; the office was not created until 1869.

The power of the Supreme Court itself to issue a writ of habeas corpus under the Judiciary Act of 1789 was questioned as early as 1807. In that case, referring to the provisions of the Constitution, and to the Judiciary Act, just quoted, Chief Justice MARSHALL said:

> "It may be worthy of remark that this Act was passed by the first Congress of the United States sitting under a Constitution which had declared 'That the privilege of the writ of habeas corpus should not be suspended, unless when, in cases of rebellion or invasion, the public safety might require it.'
>
> "Acting under the immediate influence of this injunction (of the Constitution), they must have felt, with peculiar force, the obligation of providing efficient means by which this great Constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted."

Ex parte Bollman, 4 Cranch, 74.

It will be observed that by this Act of 1789 the power to issue such writs was confined with respect to justices and judges, as distinguished from courts, to Justices of the Supreme Court and Judges of the District Court. At that time there were no Circuit Judges *eo nomine.* The Statute of 1789 is important as the first step in the development of the law. Referring to that Act in *ex parte Milligan,* 4 Wall. 2, at p. 110, this Court said:

> "Chief Justice MARSHALL, in *Bollman's* case, construed this branch (the 14th section) of the Judiciary Act (of 1789) to authorize the courts *as well as the judges to issue* the writ for the purpose of inquiring into the cause of the commitment, and this construction has never been departed from."

After the Act of 1789 came:

Statutes of 1833, Chapter 57, Section 7, 4 Statutes at Large, 634:

> "And be it further enacted that either of the Justices of the Supreme Court or a Judge of any District Court of the United States in addition to the authority already conferred by law, shall have the power to grant writs of habeas corpus."

There were not yet any Circuit Judges *eo nomine*. The first statutory provision fully covering habeas corpus, known generally as the Habeas Corpus Act, was Statutes of 1867, Chapter 28, 14 Statutes at Large, 385, February 5, 1867:

> "That the several courts of the United States and the several justices and Judges of such courts within their respective jurisdictions, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the Constitution or of any treaty or law of the United States; and it shall be lawful for such persons so restrained of his or her liberty to apply to either of said Justices or Judges for a writ of habeas corpus * * * said Justice or Judge to whom such application is made shall forthwith award a writ of habeas corpus unless it shall appear from the petition itself that the party is not deprived of his or her liberty in contravention of the Constitution or laws of the United States."

The Statute of 1867 came before this Court for construction in the case of

Ex parte McCardle, 73 U. S., 318, 325.

Chief Justice CHASE, referring to the first section of the Act, said:

> "The first section gives to the several courts of the United States, and the several justices

and judges of such courts within their respective jurisdictions, in addition to the authority already conferred by law, power to grant writs of habeas corpus in all cases where any person may be restrained of liberty in violation of the Constitution, or of any treaty or law of the United States.

"This legislation is of the most comprehensive character. It brings within the habeas corpus jurisdiction of every court and of *every judge* every possible case of privation of liberty contrary to the National Constitution, treaties or laws. It is impossible to widen this jurisdiction."

The following language of Justice BREWER in *Whitney* v. *Dick,* 202 U. S., 132, 136, is also significant:

"It is doubtless true that if the language of the Court of Appeals act was fairly susceptible of two constructions, one granting and the other omitting to grant power to issue a writ of *habeas corpus,* the great importance of the writ might justify a construction upholding the grant. This is indicated by the ruling in *ex parte Bollman,* 4 Cranch, 75. The fourteenth section of the original judiciary act contained this language: 'That all the beforementioned courts of the United States shall have power to issue writs of *scire facias, habeas corpus,* and all other writs, not especially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.' And the question presented was whether the grant of power to issue a writ of *habeas corpus* was an absolute and independent grant or one simply authorizing the issue of the writ when necessary for and in aid of the exercise of a jurisdiction already otherwise obtained, and it was held to be an absolute and independent grant, the conclusion being placed by Chief Justice MARSHALL, delivering the opinion of the court, partly on

> the grammatical construction of the section and partly on the significance and importance of the writ itself. But in the Court of Appeals act there is no mention of *habeas corpus*, no language which can be tortured into a grant of power to issue the writ, except in cases where it may be necessary for the exercise of a jurisdiction already existing."

(Certain provisions of the Act of 1867 relating to appeals from the Circuit Court to the Supreme Court of the United States were repealed by the Act of March 27, 1868, 15 Statutes at Large, 44, but such repeal is unimportant to the consideration of the precise point before the Court in the instant case. Moreover, the repealing clause of the Act of 1868 disappeared by the amendment of the Act, March 3, 1885.)

The next act of importance is that of April 10, 1869 (16 Statutes at Large, 44), entitled "An act to amend the Judicial system of the United States," *providing, for the first time, for the appointment of Circuit Judges.*

Section 1 provided for the increase of the number of Supreme Court Judges to nine.

Section 2 provided as follows:

> "That for each of the nine existing Judicial Circuits there shall be appointed a Circuit Judge who shall reside in his Circuit and shall possess the same power and jurisdiction therein as the Justice of the Supreme Court allotted to the Circuit."

By the terms of this Act there was conferred on Circuit Judges all powers theretofore possessed by Justices of the Supreme Court, including the power to issue writs of habeas corpus. No Circuit Judges having been appointed at the time that the Habeas Corpus Act of 1867 went into effect, the language of that Act: "The several Justices and Judges of such Courts within their respective juris-

dictions," did not apply to Circuit Judges at the time of the passage of the Act. But when the Circuit Judges were appointed by the Act of 1869, quoted above, there was conferred upon them all of the powers of Supreme Court Justices within their respective Circuits one of which was the power to issue writs of habeas corpus, which always inhered in the office of Supreme Court Justice.

The Circuit Judges received a baptism of power to issue this writ at the moment of their appointment; and this power did not originate in or spring from the panoply of a Court.

The Act of 1869, providing for the appointment of Circuit Judges, was re-enacted in substance in Section 607 of the Revised Statutes reading as follows:

> "For each circuit there shall be appointed a circuit judge, who shall have the same power and jurisdiction therein as the justice of the Supreme Court, allotted to the circuit * * *. Every circuit judge shall reside within his circuit."

We return now to the main thread of the statutory enactments relating to the subject of Habeas Corpus.

The Habeas Corpus Act of 1867 was transposed into the Revised Statutes of 1873-1874 and became Sections 751 and 752, differing but slightly in phraseology.

It will be observed that the words of the Habeas Corpus Act of 1867, reading as follows:

> "That the several courts of the United States and the several Justices and Judges of such courts within their respective jurisdictions, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus," etc.

were split into two sections by the Revised Statutes of 1873-1874 and became:

> "Section 751. The Supreme Court and the Circuit and District Courts shall have power to issue writs of habeas corpus."

and

> Section 752. The several Justices and Judges of the said Courts, within their respective jurisdictions shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty."

Under the familiar canons of statutory construction, the revision of the language of the Habeas Corpus Act, without any apparent intention to change its effect, brought about no substantial change in the law, so that the specification of the several courts of the United States as: "the Supreme Court and the Circuit Court and District Courts" meant substantially what it did in the first place in the Habeas Corpus Act of 1867, namely, that the power was conferred upon the "several Justices and Judges of such courts," to wit, the Supreme Court and the District Courts, *as expanded by the Act of 1869,* appointing Circuit Judges and giving them the same power, within their jurisdiction, as Supreme Court Justices.

There never has been an express change in the Habeas Corpus Act of 1867 except in its revision by the Revised Statutes. The word "Circuit" has been bracketed by compilers to indicate that it has been omitted, in the enumeration of the courts, in various annotated compilations of the laws of the United States, but *has not been physically struck out of the section.* The Habeas Corpus provisions remain exactly as they were.

It is an "elementary rule that a special and particular statutory provision affording a remedy for

particular and specific cases is not repealed by a general law unless the repeal be express or the implication to that end be irresistible" (*Ex parte United States*, 226 U. S. 420, 424, citing *Petri* v. *Creelman Lumber Co.*, 199 U. S., 487).

(For purposes of historical completeness we may make mention, in passing, that on August 29, 1842, there was enacted Chapter CCLVII, known as 5 Statutes at Large, 539, but it is not directly important to the subject in hand. Its terms are limited to "subjects or citizens of a foreign State.")

This Court has shown no tendency to restrict the "appropriate sources of judicial power" to issue the writ.

Ex parte Tracy, petitioner, 249 U. S., 551, *per curiam*,

> "For the purpose of redressing assumed violations of the Constitution and laws of the United States *by means* of habeas corpus, the jurisdiction *of other competent courts* to afford relief *may not be passed by* and the original jurisdiction of this Court be invoked in the absence of exceptional conditions justifying such course (*Matters* v. *Ryan*, 249 U. S., 375, *ante*).
>
> "When leave to file the petition for habeas corpus was previously denied, without a suggestion as to the existence of any exceptional condition which would have justified a contrary view, such refusal presumably was based on *the existence of the right to seek, if desired,* other and appropriate sources of relief. From this it follows that although we pass the application of the doctrine that the refusal of habeas corpus is not the thing adjudged, precluding a subsequent granting of such writ upon the same facts, nevertheless there is here no reason to grant the order prayed, since the previous order rested upon *the right and duty to petition for relief, if habeas corpus was*

desired, to other and appropriate sources of judicial power." (Italics ours.)

What are the "other and appropriate sources of judicial power" thus referred to? Are they confined to district Courts and District Court Judges, in view of the broad general grant in the Habeas Corpus Act of power to "the several courts of the United States and the several Justices and Judges of such Courts"? Or do such sources include Circuit Judges?

What reason has been suggested or can be suggested why Circuit Judges, who, from the time of their creation, possessed, enjoyed and exercised, in numberless cases, the right and duty to issue the writ of habeas corpus, should be stripped of that right? It cannot have resulted from the mere fact that the Circuit Judges sit in a Court of Appeals. The Circuit Judges are just as competent now as they have always been to issue the writ. If they have lost the right, it must have been by indirection.

The question presents three aspects:

1. What was the meaning of the *Judiciary Act* of 1789, confirmed by the Act of 1833, giving the power to issue the writ to Justices of the Supreme Court and to Judges of the District Courts, as expanded by the Law of 1869 conferring on the newly appointed Circuit Judges the same power and jurisdiction, within their respective jurisdictions, as Justices of the Supreme Court?

2. Is there any doubt that the *Habeas Corpus Act* of 1867 conferring the right on Justices of the Supreme Court and Judges of the District Courts, was expanded by the Act of 1869 conferring on the Circuit Judges, within their jurisdictions, the same powers as Supreme Court Justices? The Habeas Corpus Act has never been changed in substance; it has been merely codified in the Revised Statutes.

3. Was any repeal of the power of Circuit Court Judges to issue the writ effected by the *Judicial Code,* merging the Circuit Court into the District Court? As the inquiry is limited, in the instant case to the jurisdictional powers of a judge, *qua* judge, the abolition of the Court, in which he usually sat, or the transfer of its powers, would appear to be of slight, if any, significance. In *Ex parte United States,* 226 U. S. 420, 423, this Court said:

> "It is of course undoubted that Chapter XIII of the Judicial Code, while not interfering with the tenure of office of the Circuit Judges, abolished the Circuit Courts."

A very material consideration, we submit, is that when Circuit Judges were created no new Court was created—the Circuit Court was already in existence. The Circuit Judges took their places on the bench of the Circuit Court. As the Circuit Judges did not derive their origin from a Court, it is hard to see how they could lose any of their powers or jurisdiction, as Judges, by the abolition or merger of the Court in which they usually sat.

The holding of the lower Court is, in effect, that by the abolition or merger of the Circuit Court, the Circuit Judges were shorn of all of their powers —nothing was left to them except their bare titles— and that they were re-clothed with the power, and only with the power, to sit on the bench of the Circuit Courts of Appeal.

We know, however, that they retained jurisdiction to sit under the Expedition Act (*ex parte United States,* 226 U. S. 420, 423). Furthermore, they retained jurisdiction to sit under the Chinese Exclusion Act of 1892, §6: "The designation of the Judge, in general terms, as 'a United States Judge' is an apt and sufficient description of a Judge of a Court of the United States, and is equivalent to or synonymous *with the designation, in other statutes, of the Judges authorized to issue writs of habeas*

corpus, or warrants to arrest persons accused of crime" (citing Rev. Stat., §752, 1014) *Fong Yue Ting* v. *United States,* 149 U. S., 698, 728. The Circuit Judges are comprehended within the category of "any Justice or Judge of the United States" in §1014 of the Revised Statutes relating to the arrest and holding or bail of persons accused of crime. They also may, without designation, grant injunctions or restraining orders in cases pending in the District Courts of their Circuits (Judicial Code §264) and upon designation by the President, act as a Judge of the Court of Customs Appeals (Judicial Code, §188). As the Circuit Judges retained these several powers as Judges, under the separate acts conferring them, notwithstanding the abolition or merger of the Circuit Courts by the Judicial Code, how can it be said that they were, by the Judicial Code, shorn of the power conferred by the separate Habeas Corpus Act, unrepealed, to issue the great writ, which they had exercised in numberless instances covering over half a century, of which *Carper* v. *Fitzgerald,* 121 U. S., 87; *McKnight* v. *James,* 155 U. S., 685; *Lambert* v. *Barrett,* 157 U. S., 697; *In re George Macdonnell,* 11 Blatchford, 79; *Ex parte Schmeid,* 1 Dillon, 587; *In re King,* 51 Fed., 434; *Ex parte Davis,* 112 Fed., 139, and *Ex parte Jacobi,* 104 Fed. 681, are instances.

A policy thus manifested by definite Acts of legislation cannot be assumed to have been reversed (or minimized) simply because Congress in abolishing a *Court* may be considered to have used language which construed strictly and without regard to the purpose or spirit of the legislation may have rendered the words describing the officers who are vested with the authority to issue the writ no longer technically or literally applicable to one class (and a numerous and highly responsible

class) of Judges. It would be a violent assumption that in dispensing with the machinery of a Court, Congress intended to strip the Judges thereof of their own inherent powers, especially where the act was not to be "construed to prevent any Circuit Judge holding District Court or serving in the Commerce Court, or otherwise, as provided for and authorized in other sections of this Act" (Judicial Code, §118). The exercise of this power by a Circuit Judge is well exampled in the leading case before this Court of *Carper* v. *Fitzgerald,* where the Circuit Judge at his Chambers in Baltimore granted the writ and the papers were sent on to the Clerk at Richmond, Virginia, and this Court held that the order made by the Circuit Judge was not a Court order but a Judge's order.

The thought above expressed is in line with the expression of Chief Justice MARSHALL in *ex parte Bollman,* that if the exercise of the writ be curtailed the privileges of the writ itself will be lost. How can it be said that, when acting as Circuit Judge, Judge MANTON was acting solely as a Judge of the Circuit Court of Appeals, as was implied by the majority judges of the Court below (Record, page 1138, fol. 3414, page 1160, fol. 3478).

A general act does not repeal a special act, unless the intention clearly appears (*Ex parte United States,* 226 U. S., 420).

It is a settled rule of statutory construction that repeals by implication are not favored, and will not be held to exist if there be any other reasonable construction (*Ex parte Webb,* 225 U. S. 663, 683).

We submit that there is no escape from the proposition that if, by the Judicial Code, the Circuit Judges were stripped of the power to issue habeas corpus, they were stripped of all of their powers, and, since then, have had only such powers and jurisdiction as they were re-clothed with by the

Judicial Code. And yet we have seen (pp. 65-66, *supra*) that they have retained jurisdiction to do many acts in the capacity of Judge and have other functions than those of a member of the Circuit Court of Appeals.

In this age the tendency of judicial interpretation is to expand rather than contract the capacity and usefulness of Judges. There is certainly need for their utmost activity, and we have been admonished, ever since the time of Chief Justice Marshall, that it can be no better employed than in giving effect to the Habeas Corpus Act, lest the means failing the writ itself would be lost.

In the instant case, Circuit Judge MANTON was the regularly acting Judge holding the chambers part of the District Court, under designation, when the writ was issued (*Record,* pages 868, 869, fols. 2604, 2605; pages 881-886, fols. 2643-2658). He was the judge before whom it was our duty to go and he was the judge whose business it was—using the word in its proper sense—to issue the writ.

But, though thus designated, the point of the jurisdiction and power of a Circuit Judge to issue a writ of habeas corpus is necessarily involved, for only by holding that a Circuit Judge had no such jurisdiction or power, and that the order was an order *of the District Court,* did the Circuit Court of Appeals below assert jurisdiction to hear and decide the appeal, notwithstanding the petitioner's motion to dismiss the appeal.

So long as the order discharging the Comptroller remained effective, the capacity in which Judge MANTON had acted, whether as Circuit Judge or under designation to perform the duties of a District Judge, did not appear to be important, and the question seemed to be a moot one.

Now, however, that the Circuit Court of Appeals has based its own jurisdiction to entertain and de-

cide the appeal solely upon the ground that the order is an order of the District Court, and is not an order of a Circuit Judge, because of lack of power in a Circuit Judge to make the same, the case requires the proper decision of the question whether a Circuit Judge has such power.

POINT IV

In issuing the writ, Circuit Judge Manton, in addition to his powers as a circuit judge, was exercising the powers of a district judge, under designation.

Under the designation, by the senior Circuit Judge, of Judge Manton to sit in the District Court at the time that the writ was granted (Record, fols. 2604-2605), he, as Circuit Judge, drew to himself, or had conferred upon him any additional powers that a District Court Judge in Chambers might exercise. By the combined prerogatives of Circuit Judge and District Court Judge, Judge Manton had indisputable right to grant the writ.

This Court has explicitly held:

> "The statute (the Judicial Code, §§14, 18 and 19) while contemplating as a general rule the holding of District Courts by district judges and as a general rule for holding Circuit Courts of Appeal by circuit judges, * * * clearly gives to the circuit judges the rights and powers of judges of the new District Courts, and calls such powers into play when assigned acording to law."
>
> *Ex parte United States*, 226 U. S. 420, 423, 424.

But the majority judges of the Court below completely disregarded this ruling (*Record*, page 1137, fols. 3409, 3410; page 1160, fol. 3478). For the

purpose of asserting jurisdiction, they viewed the order appealed from as an order *of* the District Court, whereas in fact it was not a court order, but a judge's order, as determined in *Carper* v. *Fitzgerald,* 121 U. S. 87.

Counsel for the petitioner stated in the habeas corpus proceeding that he not only intended to present the question to Judge Manton as a Circuit Judge, but "in a formal way to ask your Honor to take judicial notice of the fact that you were at that time designated *as a District Judge*" (fols. 2622-2627).

At that time, the return had not been filed, nor, of course, had the traverse been filed. After that the traverse was filed and counsel for the petitioner presented in a formal way the designation referred to, which was annexed to the traverse (fols. 2604-2605) and is part of the evidence, so that if the designation be not judicially noticed, proof of it was before the Court, as well, also, that he was the only judge attending to chambers business in the District Court or of the District Court Judge on February 24, 1921, when the writ was granted (fols. 2645-2655).

There is no need for petitioner to stand upon one ground alone, when two exist contemporaneously; nor can he be, nor should he be, forced to an election, or to imperil his remedy upon choosing between one or the other of the official capacities which Judge Manton possessed, in connection with this writ. It is not a case of one or the other; it is a matter of *both*. When Judge Manton exercised one, he exercised the other.

The Judicial Code provides as follows:

> "Whenever, in the judgment of the senior Circuit Judge of the Circuit in which the district lies, or of the Circuit Justice assigned to

such Circuit, or of the Chief Justice, the public interest shall require, the said Judge, or Associate Justice, or Chief Justice, shall designate and appoint any Circuit Judge of the Circuit to hold said District Court" (Judicial Code, Sec. 18).

The amendment of Chapter 18 of the Laws of 1913 related only to the addition of the second paragraph of Sec. 18 of the Judicial Code which does not affect the instant proceeding. This section is only important in the present instance as a basis for the exercise of the powers prescribed by the succeeding section.

"Sec. 19. It shall be the duty of the district or circuit Judge who is designated and appointed under either of the six preceding sections, to discharge all the judicial duties for which he is so appointed, during the time for which he is so appointed, and all the acts and proceedings in the courts held by him, *or by or before him,* in pursuance of said provisions, shall have the same effect and validity as if done by or before the *district judge* of the said district."

The designation of Judge Manton, in force at the time the writ was issued, read as follows:

"In order to meet the requirements of the public interest and under the authority conferred by Section 18 of the Judicial Code as amended, I hereby designate and appoint United States Circuit Judge Martin T. Manton, to hold a session of the District Court of the United States, for the Southern District of New York, for the trial of causes and the hearing and disposition of such *ex parte* and other business as may *come before him* during the period beginning February 1st, 1921, and ending March 5, 1921" (fols. 2604-2605).

It will be observed that the words of the Statute are in the first place:

(a) shall designate and appoint any Circuit Judge of the Circuit to hold said District Court (Section 18), but the following section does not limit the Judge so designated to holding the Court; it provides that "all the acts and proceedings * * * *by or before him,* in pursuance of such provisions, shall have the same effect and validity as if done by or before the *district judge of the said district.*"

The use of asterisks in the clause last quoted is merely for perspicacity. We are confident that the omission indicated does not change the true or full meaning of the section, which is quoted above in its entirety.

The designation, it will be observed, follows the lines of the Statute, but expresses the acts which Judge Manton was designated to perform in somewhat different language, *inter alia* "and other business as may *come before him* during the period." Surely the granting of the writ of habeas corpus, as in this instance, would most appropriately be included within the terms of the Statute "by or before him," and the language of the designation "and other business as *may come before him.*"

In other words, the power, if any, that Judge Manton exercised, flowing from his designation, was *pro hac vice* the power of a judge of the District Court. While designated to hold a District Court, that was not the boundary of the designated powers, but out of and from the designation proceeded the power and authority to perform "All the acts and proceedings" "by or before" the Circuit Judge designated to sit in the District Court, with "the same effect and validity as if done by or before the District Judge of the said District."

By virtue of the Statute and the designation, there were conferred upon Judge Manton the *addi-*

tional powers, if any, of a District Judge, and by the exercise of those powers he *drew unto himself* as a Circuit Judge such additional powers. There was conferred upon Judge Manton the power to hold a District Court, but only when, holding the District Court, strictly as such, were his official acts those of a Court; at all other times, as contemplated by the Statute and by the designation, when the Court was not in session, Judge Manton was performing the acts of the District Judge, as such, and, while performing them, he was still a Circuit Judge.

A Circuit Judge can no more lay aside his title and powers of Circuit Judge than could he be stripped of them; he is always a Circuit Judge (*McCarron* v. *The People,* 13 N. Y., 74), and sometimes—that is to say, when sitting in the Court of Appeals—he is a Judge of that Court, and when designated to hold the District Court, all the acts and proceedings in the Courts held by him, or by or before him have the same effect and validity as if done by or before the District Judge, but he is never a District Judge.

A Justice of this Court when holding, with other Judges, a Circuit Court, was not a Circuit Judge, though he functioned as a Judge of the Circuit Court.

REGARDLESS OF ANY POSSIBLE LACK OF POWER IN A CIRCUIT JUDGE AS SUCH TO ISSUE A WRIT OF HABEAS CORPUS OR TO MAKE THE ORDER APPEALED FROM, JUDGE MANTON IN THE CASE AT BAR HAD POWER TO ISSUE THE WRIT AND MAKE THE ORDER.

Even if this Court shall hold that a Circuit Judge has no power, as such, to grant a writ of habeas corpus, he may have the power, under Section 752 of the Revised Statutes, whenever he

is a Judge *of* the District Court, which a Circuit Judge now may be, just as, in the days before the Judicial Code, a District Judge was at times a Judge of the Circuit Court. A Circuit Judge is surely not functioning as a Judge of the Circuit Court of Appeals when he is sitting as a Judge of the District Court under the Expedition Act of 1903 (32 Stat., 823). A Circuit Judge has other powers than as a Judge of the Circuit Court of Appeals. He may, at times, be a Judge of the District Court, under a designation to hold a District Court by assignment pursuant to Section 18 of the Judicial Code. District Judges have no monopoly of that designation; and they, in turn, may also be, at times, Judges of the Circuit Court of Appeals.

It is respectfully submitted that the Senior Judge of the Circuit Court of Appeals in his opinion wrongly based his argument on the false assumption that the term "Circuit Judge" was exactly synonymous or interchangeable with the term "Judge of the Circuit Court of Appeals" (Record, page 1137, fol. 3413). The position of the petitioner on this point has been misconceived. The contention has been that the Circuit Judge, even if lacking power as such, had, in the case at bar, under and by virtue of the order designating him to hold the District Court, the same authority to act as a Judge *of* the District Court. But an order of a Judge of the District Court is not necessarily a District Court order. In a habeas corpus proceeding, it may be a Judge's order, pure and simple. And so Section 752 of the Revised Statutes does today relate to a Circuit Judge, whensoever he may be acting under a designation with the authority of a Judge of the District Court.

U. S. v. *Clarke,* 1 Gall., 497, 499; STORY, *J.*
Fong Yue Ting v. *U. S.,* 149 U. S., 698, 728-9, 742.

This Court has distinctly recognized that where Congress has committed jurisdiction to a Judge as a judicial tribunal, he functions through his own inherent power and not through or on behalf of the Court of which he is a member.

U. S. v. *Duell,* 172 U. S., 576, 589.

The writ granted in *Carper* v. *Fitzgerald,* 121 U. S., 87, was returnable to "the judge of our Circuit Court," and all signatures were "Hugh L. Bond, Circuit Judge" (See Transcript of Record in that case at page 2). The order of the Circuit Judge therein was expressly adjudged by this Court to be not an order of the Circuit Court.

Carper v. *Fitzgerald,* 121 U. S., 87.

The order of Circuit Judge MANTON was therefore a judge's order.

POINT V

The decisions are uniform that no appeal lay to the Circuit Court of Appeals from an order of a *Judge;* that only an order of a Court might be reviewed by appeal or writ of error.

Carper v. *Fitzgerald,* 121 U. S., 87;
In re Lennon, 150 U. S., 393;
McKnight v. *James,* 155 U. S., 685;
Lambert v. *Barrett,* 157 U. S., 697;
Ex parte Jacobi, 104 Fed., 681;
Harkrader v. *Wadley,* 172 U. S., 148.

It makes no difference, in considering this point, whether the order be regarded as that of a Circuit Judge or of a Judge designated to perform the duties of a District Judge (as was Judge MANTON, Record, page 868, fols. 2604)—it is still a Judge's order.

The making of a Judge's order in a habeas corpus proceeding is distinctly provided for in the Revised Statutes.

Section 752 provides:

> "The several justices and *judges* of the said Courts within their respective jurisdictions shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty."
>
> (See also *Ex parte Milligan,* 4 Wall., 2, 110.

Section 761 provides:

> "The Court, or Justice or *Judge* shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments and thereupon to *dispose* of the party as law and justice require."

It is, therefore, entirely clear that such a proceeding initiated by a writ issued by a judge should be continued before and decided by the judge issuing the same, and that there is no provision nor expectation that a proceeding, thus initiated, shall be turned into a Court proceeding, or that the final order shall be a Court order.

Carper v. *Fitzgerald*, 121 U. S., 87, was an appeal from an order of a Circuit Judge discharging a prisoner on a writ of habeas corpus. That was a proceeding before the Circuit Judge at his Chambers in Baltimore, Maryland. The petition was presented to the Judge in Baltimore, who directed the Clerk of the Circuit Court for the Eastern District of Virginia to issue a writ of habeas corpus and make it returnable before him at the United States Court House in Baltimore. The writ was accordingly issued, and made returnable

> "before the Honorable HUGH L. BOND, Judge of our Circuit Court of the United States, for the Eastern District of Virginia, sitting at the United States Court House, Baltimore, Maryland."

The record showed that the jailer made his return to the writ, and that the petitioner filed a demurrer thereto, upon consideration of which an order of discharge was entered. At the foot of that order was the following:

> "And it is ordered that the papers in this case be filed in the Circuit Court of the United States at Richmond, Virginia, and that this order be recorded in said Court.—HUGH L. BOND, Circuit Judge."

From that order the jailer was allowed an appeal to this Court by the Circuit Judge, and the case was docketed in this Court as "An appeal from the Circuit Court of the United States for the Eastern

District of Virginia," but this Court refused to regard it as such.

Mr. Chief Justice WAITE delivered the opinion of the court (page 89), as follows:

> "The form of the docket entry here does not change the character of the proceeding from which the appeal was taken, and that was clearly under Section 752 of the Revised Statutes, before the Judge sitting as a Judge, and not as a Court. The Act of March 3, 1885, C. 353, 23 Stat., 437, gives an appeal to this Court in habeas corpus cases only from the final decision of a circuit court.
>
> "The order of the judge that the papers be filed, and his order recorded in the circuit court, does not make his decision as judge a decision of the court. Neither does our Rule 34, 117 U. S., 708, adopted at the last term, have that effect. The purpose of that rule was to regulate proceedings on appeals under section 763, from the decision of a judge to the circuit court of the district, as well as under section 764, as amended by the Act of March 3, 1885, from a circuit court to this court. Power to make such a regulation was given to this court by section 765 of the Revised Statutes."

The procedure and practice followed in the instant case was exactly that adopted by Judge BOND in the case referred to, except that Judge MANTON directed the order to be filed in the office of the Clerk of the District Court (the office of Clerk of the Circuit Court having been abolished) and the Clerk of the Circuit Court of Appeals having, manifestly, nothing to do with the safe keeping of such an order. Judge MANTON's decision directed that the paper be "filed" in the office of the Clerk of the District Court and that it be "recorded" in said Court (Record page 32, fol. 94.)—the words "filed" and "recorded" being the exact ones used in *Carper* v. *Fitzgerald*.

In the instant case the Circuit Court of Appeals below gave an entirely different significance to the use of those words than this Court had done, saying, in the opinion of ROGERS, *C. J.*:

> "Whatever doubt one might otherwise entertain as to the capacity in which he was acting at the time seems to be put at rest by the order which he made and which required 'that the papers in this proceeding be filed with the Clerk of the United States District Court for the Southern District of New York' and that they 'be recorded in said court.' As a Judge of the Circuit Court of Appeals he would not have directed the papers to be filed with the Clerk of the District Court and that they be recorded in that Court, but would have filed them in the office of the Clerk of his own court and ordered them to be there recorded." (Record, fols. 3421-3423.)

In the first place the Judge was not acting as a "Judge of the Circuit Court of Appeals," but as a Circuit Judge, and for that reason it would have been manifestly improper to direct that the papers be filed in the office of the Clerk of the appellate court. Nor does a Circuit Judge function only as a judge of the Circuit Court of Appeals. As there is no longer a distinct Circuit Court, nor a Clerk of a Circuit Court, there was no place to file or record them in other than the office of the Clerk of the District Court, now fulfilling the functions of successor. The office of the Clerk of the District Court has not been limited to receiving, for record, the papers in actions and proceedings pending in the court (see 28 Stat. at L. 619-20, subdiv. 5; Copyright Law of 1831, 4 Stat. at L. 437, Section 4, Act of February 3, 1831, C. XVI; R. S. 490.)

In the opinion of the Circuit Court of Appeals below, no mention is made of the decision of this Court

in *Carper* v. *Fitzgerald* (*supra*), nor of any of the other cases at the head of this point, all of which were pressed on the attention of the Court. They were either passed by or completely misapprehended.

Neither the filing of the order nor the recording of it changed its character from that of a Judge's order, as we have seen by the case last cited.

It is proper to note in passing, that the Act known as the Habeas Corpus Act, referred to in the foregoing opinion of *Carper* v. *Fitzgerald,* has never been repealed or expressly amended in its phraseology with respect to any matter now under consideration. The annotators of the Statutes have, however, assumed from time to time to excise from or interpolate in several editions of the Revised Statutes, embracing the Habeas Corpus Act, such words as they deemed appropriate to the changes wrought by the Acts of 1891 and 1911, especially relating to the abolishment of the Circuit Court.

It is noteworthy in considering the direction and effect of the case last cited that it was an appeal from an order discharging a prisoner on a writ of habeas corpus, as in the instant case, and that it was a proceeding before a Circuit Judge at his Chambers, as in the instant case.

It is also noteworthy that that decision was arrived at nothwithstanding the rule of this Court which appeared to recognize that an appeal would lie *in some cases* or under *some* circumstances from the final decision of a judge, as well as from the final decision of a Court, discharging the writ or discharging the prisoner, as the case might be. The point of the decision was that it would not lie from an order of a Circuit Judge.

If it be urged that a Judge's order is not, or ought not to be, beyond judicial review, a ready answer

may be found in pointing out that such an order may be reviewed by appropriate procedure.

In *McKnight* v. *James*, 155 U. S., 685, a proceeding was begun by a petition in habeas corpus to the Circuit Court of Franklin County, Ohio, setting forth that the petitioner McKnight was unlawfully deprived of his liberty in the Ohio penitentiary.

Under this petition a writ of habeas corpus was granted by a Judge of the Circuit Court of Ohio, Second Judicial Circuit, and the petitioner was ordered to be produced before him in Columbus. The case was heard upon the pleadings and testimony by the Circuit Court Judge sitting in Chambers, and an order made that McKnight be remanded to the custody of the warden. Whereupon the petitioner sued out a writ of error directed to the Judge by name.

After referring to the Revised Statutes, Section 709, the Court, Mr. Justice BROWN writing (at page 687), said:

> "We held, however, in *Carper* v. *Fitzgerald*, 121 U. S., 87, that an appeal did not lie to this Court from an order of a circuit judge of the United States, sitting as a judge and not as a court, discharging a prisoner brought before him on a writ of habeas corpus, for the reason that the Act of March 3, 1885 (C. 353, 23 Stat., 437) gave an appeal to this Court in habeas corpus cases only from the final decision of a Circuit *Court;* and that Rule 34 did not make his decision as a judge a decision of the *court*, the purpose of that rule being to regulate appeals to the Circuit Court from the final decision of any court, justice or judge inferior to that court, as well as appeals from the final decision of such Circuit Court to the Supreme Court." (Italics ours.)

Had the lawmakers, confronted as they were by the decision in *Carper* v. *Fitzgerald*, intended to

confer jurisdiction upon the Circuit Court of Appeals to review an order of a Circuit Judge in habeas corpus, they would have said so in terms or effect by readopting, in appropriate form, the provisions of Sections 763 and 764, or have embodied them in Sections 128 and 238 of the Judicial Code, instead of making the two sections last cited the exclusive confines of appellate jurisdiction (*Cross* v. *Burke,* 146 U. S., 82).

Not only is there no longer a Circuit Court before whom an order of inferior Judge may be reviewed, but the Statute (Sec. 763, R. S.) was not amended so as to change the title of the Court therein specified to that of the Circuit Court of Appeals. The language of Section 763 remains bare and unchanged in phraseology, though deprived of force (*In re Lennon,* 150 U. S., 393; *Cross* v *Burke, supra*).

In the case of *Lambert* v. *Barrett,* 157 U. S., 697, Theodore Lambert "presented to one of the Judges of the Circuit Court of the United States for the Third Circuit at Chambers on December 28, 1894, his petition for habeas corpus."

The Circuit Judge to whom the petition was presented, upon consideration thereof and the matters therein set forth, refused to issue the writ; whereupon an appeal from the order denying the application was allowed, but was dismissed by this Court, Mr. Chief Justice FULLER saying:

> "Moreover, the order from which the appeal was taken was not a final decision of the Circuit Court of the United States for the District of New Jersey, but was an order of the Circuit Judge at Chambers, and an appeal from such an order will not lie."

In *Harkrader* v. *Wadley,* 172 U. S., 148, 162, this Court, by Mr. Justice SHIRAS, said:

"It is, indeed, true, as was decided in *Carper* v. *Fitzgerald,* 121 U. S., 87, that no appeal lies to this Court from order of a circuit judge of the United States, and not as a court, discharging the prisoner brought before him on a writ of habeas corpus. But this record discloses that, while the original order was made at Chambers, the final order, overruling the return of the sheriff and discharging the prisoner from custody, was the decision of the circuit court at a stated term, and therefore the case falls within *In re Pulliser,* 136 U. S., 257, 262."

Another instance where the case was heard by the Court and not by a judge is *Whitten* v. *Tomlinson,* 160 U. S., 231.

The very basis of the appeal in the instant case was that it was an order of a Circuit Judge (Vide Assignments of Error, Record, fol. 5).

The order was neither referred to in the assignment of errors as an order of the District Court, nor any error assigned presenting the order for review as an order of the District Court. The Court below, in treating and holding the order as an order of the District Court, so as to assert and to maintain its foothold of jurisdiction, and reversing it as such, proceeded to that end without any assignment of error raising any such point, and also without statutory power to review a judge's order.

The statute confers no power on the Circuit Court of Appeals to review the action of a Circuit Judge.

Even if it be granted, for the sake of the argument, that the order is the order of a Circuit Judge, regardless of his designation to perform the acts of a District Judge, and that he had no power as a Circuit Judge to issue a writ of habeas corpus, the *Circuit Court of Appeals itself had no authority whatever to review the order or decision of a Circuit Judge.* If it be assumed that there was an

unwarranted exercise of power by a Circuit Judge that would not confer a power on the Circuit Court of Appeals to review his action.

The distribution of the appellate jurisdiction of the United States Courts and the purposes that were intended to be accomplished by sections 128 and 238 of the Judicial Code, namely, to closely confine the jurisdiction of the Circuit Court of Appeals and to closely limit appeals to the Supreme Court, respectively, need not be dilated upon (*McLish* v. *Roff*, 141 U. S., 661).

When Congress by the Act of 1891, in part, and wholly in 1911, set up the new appellate court, it did not attempt to strip the circuit judges of all of their powers except to sit upon the bench of the appellate court and to be designated to sit in an inferior court; it contented itself by abolishing the Circuit Court and by specifying that the Circuit Judges, who sit in the Court of Appeals, might be designated to sit also in the District Court.

If it be argued that Congress overlooked the possible exercise of the power by a Circuit Judge, after the creation of the Circuit Court of Appeals, such an oversight cannot, by any stretch of argument, create or imply jurisdiction to review its exercise by a Court of Appeals not expressly authorized so to do.

It is axiomatic that the jurisdiction of the Circuit Court of Appeals is purely statutory. The definition by BAKER, *Circuit Judge*, of the jurisdiction of a trial Court of the United States is appropriate as well to a Circuit Court of Appeals: "A court sharply restricted both as to persons and subject matters."

These cases go upon the ground that the sole jurisdiction conferred on the appellate courts is to review the final orders of courts below by appeal

or writ of error, no jurisdiction having been conferred to review a judge's order. One reason for that, and perhaps the most applicable one, is that there is no finality in form or substance to a judge's order, and another is that in habeas corpus the discharge does not reverse the conviction.

There is a direct conflict between the Circuit Courts of Appeal for the Second and Fifth Circuits upon the appealability of the order of a Judge.

The Circuit Court of Appeals in the instant case held that:

> "The order sustaining the writ and ordering the discharge of Craig, and which the Judge ordered recorded in the District Court, and which is the order appealed from, must be regarded as made by him under his designation to hold the District Court for the Southern District of New York. And as such an appeal from that order was properly taken to this Court." Opinion ROGERS, *C. J.* (*Record*, page 1140, fol. 3422), concurred in by HOUGH, *C. J.* (*Record*, page 1160, fol. 3479).

But, in point of fact, the order followed precisely the formula laid down in *Carper* v. *Fitzgerald*, 121 U. S., 87, in which the order was held "the order of the Judge," not "a decision" or order "of the Court" in which the papers were filed or in which the Judge usually sat.

The Court below in the instant case reached its conclusion, notwithstanding that the designation embraced also "the hearing and disposition of such *ex parte* and other business as may come before *him* during said period" (*Record*, page 868, fol. 2604), and notwithstanding that the writ was granted in Chambers, the District Court not being then in session, and that the hearing was had in

Chambers (*Record,* pages 883-886, fols. 2649-2658, pages 888, 889, fols. 2662-2666).

By treating the order as an order of the Court, instead of as an order of a Judge, the Circuit Court of Appeals ignored in its opinion the effect of the holding in *Hoskins* v. *Funk,* 239 Fed. Rep., 278, by the Circuit Court of Appeals for the Fifth Circuit, that a Circuit Court of Appeals had no jurisdiction to review an order of a Judge, although that case was pressed upon the attention of the Court below.

The conflict, though ignored, exists, nevertheless, between the decisions in the two Circuit Courts of Appeal.

POINT VI.

This Court had exclusive jurisdiction, by direct appeal, to review the order discharging the petitioner, which was based upon a finding that the petitioner had been deprived of his liberty by an excess of power, involving the construction and application of the Constitution of the United States. The assumption of jurisdiction by the Circuit Court of Appeals warrants and requires the intervention of this Court.

The petitioner claimed that he had been deprived of his liberty without due process of law because, in the contempt proceedings, the Court had proceeded without any foundation of jurisdiction, and in excess of its powers, being delimited by the terms of a Federal Statute to punishing acts tending to obstruct the administration of justice in a pending cause, when in fact there was no matter pending calling for judicial determination, nothing *sub judice.*

The petition for writ of habeas corpus set forth (Record, fol. 126):

> "Your petitioner further alleges that said *order and commitment were and are void* and were made *without any jurisdiction* in the Court or the said Judge to make, file or enter the same and that your petitioner is being deprived of his liberty without any lawful warrant or authority whatsoever and without due process of law and, since being taken into custody by said Marshal, as aforesaid, has been continuously so deprived of his liberty, in violation of the Constitution of the United States, and especially the Fifth Article of the amend-

ments thereof, and in violation of the laws of the United States."

Judge MANTON in his opinion devoted himself principally to the point of absence of jurisdiction and the consequent excess of power, citing *Ex parte Hudgings,* 249 U. S., 378; *Ex parte Royall,* 117 U. S., 241; *Ex parte Lange,* 85 U. S. (18 Wall), 163; *New York* v. *Eno,* 155 U. S., 89; *In re Loney,* 134 U. S., 372; *Ex parte Siebold,* 100 U. S., 371; *Ex parte Parks,* 93 U. S., 18.

The construction or application of the Federal Constitution was thus involved. This Court, therefore, had exclusive jurisdiction of any appeal. (*Judicial Code,* Sec. 238; *Raton Waterworks Co.* v. *City of Raton,* 249 U. S., 552; *Union & Planters Bank* v. *City of Memphis,* 189 U. S., 71; *Carolina Glass Co.* v. *State of South Carolina,* 240 U. S., 305, 318; *Horn* v. *Mitchell,* 243 U. S., 247; *Greene* v. *Louisville & I. R. R. Co.,* 244 U. S., 499; *Pierce* v. *Creecy,* 210 U. S., 387; *Horner* v. *United States,* 143 U. S., 207; *Collins* v. *Board of Control,* 219 Fed., 885; *W. S. Tyler Co.* v. *Ludlow-Saylor Wire Co.,* 212 Fed., 156; *Grammer* v. *Fenton,* C. C. A., Eighth Circuit, 268 Fed., 943.)

POINT VII.

If the Circuit Court of Appeals had no jurisdiction to review the order of a Circuit Judge, its determination should be reversed regardless of the question as to whether the District Court acted in excess of its powers, and regardless, also, of whether Habeas Corpus was the proper remedy, leaving those questions to be reviewed by appropriate procedure.

If this Court reaches the conclusion that the Circuit Court of Appeals unwarrantedly assumed jurisdiction to review an order of a Circuit Judge; that no such jurisdiction has been conferred by statute on the Circuit Court of Appeals, the proper course to pursue is to reverse the determination of that Court, with a direction to dismiss the appeal (as was done in *First National Bank of Chicago* v. *Chicago Title & Trust Co.*, 198 *U. S.*, 280, 292), without inquiring whether Judge MAYER exceeded his jurisdiction in adjudging the petitioner in contempt, and without inquiring whether habeas corpus was the proper remedy and was properly exercised in this case. In other words, even though the petitioner was rightfully convicted, and even though he were wrongfully released under habeas corpus, if the Circuit Court of Appeals had no jurisdictional power to review either of those questions, they must be presented by appropriate methods of review before the appropriate forum.

POINT VIII.

Habeas Corpus was the proper and effective remedy for excess of power or lack of jurisdiction in the commitment for asserted contempt.

Ex parte Hudgings, 249 U. S., 378;
In re Watts, 190 U. S., 1;
Cuyler v. *Atlantic & N. C. R. Co.* (*in re Daniels*), 131 Fed., 95;
In re Reese, 98 Fed., 984;
Ex parte Dock Bridges, 2 Woods, 428;
Ex parte Lange, 18 Wall, 163;
Ex parte Siebold, 100 U. S., 371;
Ex parte Fisk, 113 U. S., 713;
In re Ayers, 123 U. S., 443;
Hans Nielsen, Petitioner, 131 U. S., 176;
Cuddy, Petitioner, 131 U. S., 280, 283;
In re Mayfield, 141 U. S., 107;
Ex parte Robinson, 144 Fed., 835.

A single Judge of a lower court has the same power as the Supreme Court to issue a writ of habeas corpus. *Ex parte Milligan,* 4 Wall., 2, 110; R. S., Sects. 751, 752.

"And although it may appear unseemly that a prisoner after conviction * * * should be set at liberty by a single Judge on habeas corpus there seems to be no escape from the law." Mr. Justice BRADLEY, sitting as Circuit Judge in *Ex parte Dock Bridges,* 2 Woods, 428, 432; referred to with approval in *Ex parte Royall,* 117 U. S., 241, at page 253.

There has been no change in the law in that respect.

That the Congress has liberalized the common law scope of habeas corpus is frequently overlooked by Courts and counsel. In the instant case

the Court below cited and quoted from a number of cases under the common law, and others, notably *Ex parte Tobias Watkins,* 3 Peters 193, and *Ex parte Kearney,* 7 Wheaton, 38, decided before the Act of 1831, defining the power of Federal Courts in the punishment of contempt and also prior to the Habeas Corpus Act of 1867, which latter expressly provided that:

> "The Court or Justice or Judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments and thereupon to dispose of the party as law and justice require." (R. S., Sec. 761.)

A prisoner may have a judicial inquiry in a Court of the United States into the very truth and substance of the causes of his detention, although it may become necessary to look behind and beyond the record of his conviction to a sufficient extent to *test the jurisdiction* of the Court to proceed to judgment against him. *Frank* v. *Mangum,* 237 U. S., 309, at p. 331.

In *Ex parte Lange,* 18 Wall, 163, 166, the Court declared that its authority

> "to issue this writ and to examine the proceedings in the inferior Court, so far as may be necessary to ascertain whether that court has exceeded its authority, is no longer open to question."

In *Ex parte Siebold,* 100 U. S., 371, the Court not only asserted its right by habeas corpus to enquire as to (page 376)

> "clear and manifest *want of criminality in* the matter charged, such as in effect to render the proceedings void";

but that (page 377)

> "personal liberty is of so great moment in the eye of the law that the judgment of an

> inferior court affecting it is not deemed so conclusive, but that * * * the question of the *court's authority* to try and imprison the party *may be reviewed* on habeas corpus, by a superior court or judge having authority to award the writ." (Italics ours.)

The addition of the words "by a Superior Court, or judge having authority to award the writ," is most significant in its recognition that a single judge, under the statute, has the power and authority that the Supreme Court itself has to award the writ.

Mr. Justice BRADLEY in *Ex parte Siebold, supra,* quoted from Bacon's Abridgement as follows:

> "'If the commitment be against law, as being made by one who had no jurisdiction of the cause, or for a matter for which by law no man ought to be punished, the Court are (*sic*) to discharge.'

This was also quoted in *Ex parte Parks,* 93 U. S., 18, 22, and in *Hans Nielsen, Petitioner,* 131 U. S., 176.

Again in *Matter of Gregory,* 219 U. S., 210, at page 217, this Court recognized as an appropriate ground for the application of the writ "such an obvious and palpable *want of criminality* that the judicial judgment cannot be said to have been invoked."

In *Ex Parte Parks,* 93 U. S., 18, the Court declared a writ of habeas corpus to be appropriate and effective to enquire sufficiently to determine that (page 23)

> "no act beyond the powers conferred on it"

had been committed by the lower court, and that

> "if it (this Court) finds that the Court below has transcended its powers"

relief will be granted by this means.

In *Cuddy, Petitioner,* 131 U. S., 280, 286, which was an appeal from an order of the Circuit Court refusing a petition for a writ of habeas corpus, this Court said:

> "The judgment being attacked collaterally, and the record disclosing a case of contempt, *and not showing one beyond the jurisdiction of the court,* it must be presumed, in this proceeding, that the evidence made a case within its jurisdiction to punish in the mode pursued here. We do not mean to say that this presumption as to jurisdictional facts, *about which the record is silent, may not be overcome by evidence.* On the contrary, if the appellant had alleged such facts as indicated that *the misbehavior* with which he was charged *was not such as,* under Section 725 of the Revised Statutes, *made him liable* to fine or imprisonment, at the discretion of the Court, he would have been entitled to the writ, and, *upon proving such facts,* to have been discharged. *Such evidence would not have contradicted the record."* (Italics ours.)

The instant case came directly within the proviso above stated.

In *Ex Parte Reed,* 100 U. S., 13, 23, Mr. Justice SWAYNE said:

> "We do not overlook the point that there must be *jurisdiction to give the judgment rendered,* as well as to hear and determine the cause. If a magistrate having authority to fine for assault and battery should sentence the offender to be imprisoned in the penitentiary, or to suffer the punishment prescribed for homicide, his judgment would be as much a nullity as if the preliminary jurisdiction to hear and determine had not existed. *Every act of a court beyond its jurisdiction is void."* (Italics ours.)

Citing *Cornett* v. *Williams,* 20 Wall, 226; *Windsor* v. *McVeigh,* 93 U. S., 274.

The Information now before the Court alleged that certain *proceedings* "have been pending in this Court" (Record, pp. 44-45, fols. 131-134), and further that "The said letter, as well as the publication thereof as aforesaid, each tended and was calculated and intended by the defendant to influence this Court in its consideration of *suits* and *proceedings* aforesaid, pending when said letter was written, delivered," etc. (Record, p. 59, fols. 176-177). It did not allege that any *subject matter was pending determination.*

The conviction or judgment was expressly limited to a finding that the petitioner was "guilty of contempt of Court as charged in the Information, *in respect of* the matters set forth in paragraphs numbered 1, 2, 3 and 4 of the Information herein (fol. 2515) which had all occurred nine months before the alleged contempt (vide Information, Record, pp. 56-58, fols. 168-174).

There was no finding that any *subject-matter* was pending *sub judice*, or imminent.

On the other hand, the Petition for the writ expressly alleged (Record, p. 38, fols. 112-113):

> "a. That neither on the 6th nor the 7th day of October, 1919, *was there pending sub judice* before said District Judge or said Court *any matter or judicial determination* in any suit or proceeding mentioned in the Information or in any suit or proceeding consolidated with any or either of such suits and proceeding.
>
> "b. That all orders and judicial determinations which were referred to in the letter of October 6, 1919, from your petitioner to Lewis Nixon, Public Service Commissioner, set forth in the said Information, *had been previously made and concluded* and that no hearing was pending, awaiting determination, upon any of said orders or judicial determinations or the subject matter thereof."

And the Return to the writ admitted, as we have shown elsewhere (Record, pp. 842-843, fols. 2526-2527):

> "IV. Still insisting that your Honor is without authority to issue a writ of habeas corpus and that the petition for the writ herein is insufficient in law, and without waiver thereof, this respondent says: On October 6, 1919, *there was not pending awaiting decision any order or judicial determination* mentioned in the letter of that date from the petitioner to Lewis Nixon, set forth in the Information, but the same was still within the control of the District Court of the United States for the Southern District of New York and subject to change."

The petitioner's application for the writ came, therefore, directly and exactly within the case put in *Cuddy, Petitioner* (*supra*), and *In re Mayfield*, 141 U. S., 107, 116: (a) The "record is silent" as to any subject-matter pending *sub judice*. (2) The petition alleged that there was in fact none such pending. (3) The return admitted that "there was not pending awaiting decision any order or judicial determination."

The petitioner thus met not only every requisite mentioned in *Cuddy, Petitioner, supra,* and *In re Mayfield, supra,* but in the most satisfactory form showed that "new" fact or element on his application for the writ which HOUGH, *C. J.*, in his concurring opinion in the instant case said had not been shown (Record, fol. 3482). The allegation in the Petition and the *express admission* in the Return were at least tantamount to the proof allowed and provided for by the Habeas Corpus Act (R. S., Sec. 761), or to the legal effect of a demurrer in admitting the facts as in *Moore* v. *Dempsey*, 261 U. S., 86, and in *Hans Nielsen, Petitioner*, 131 U. S., 176, 183.

In *Hans Nielsen, petitioner,* 131 U. S., 176, 184, the Court said there must be not merely

"jurisdiction of the cause,"

but

"authority or power to condemn the prisoner"

lacking which

"a party is entitled to a habeas corpus."

and concluded with the expression: "If we have seemed to hold the contrary in any case it has been from inadvertence."

In *Ex Parte Bigelow,* 113 U. S., 328, 330, the Court said:

> "It may be confessed that it is not always very easy to determine what matters go to the jurisdiction of a court so as to make its action, when erroneous, a nullity."

This expression was repeated in *Re Eckort,* 166 U. S., 481.

This thought respecting jurisdiction is also tersely expressed by Mr. Justice HOLMES with respect to a controversy which concerned a subject limited by Federal Law (as is punishment for contempt).

> "The jurisdiction so far coalesces with the merits that a case not within the law is not within the jurisdiction of the Court" (*Lamar v. United States,* 240 U. S., 60, 64).

In *In re Mayfield,* 141 U. S., 107, 116, the Court said:

> "This Court has held, however, in a multitude of cases, that it had power to inquire with regard to the jurisdiction of the inferior court, either in respect to the subject-matter or to the person, even if such inquiry involved an examination of facts outside of, but not inconsistent with, the record."

In *In re Belt, petitioner,* 159 U. S., 95, the Court said (at p. 100):

> "The general rule is that the writ of habeas corpus will not issue unless the court, under whose warrant the petitioner is held, is *without jurisdiction,* and that it cannot be used to correct errors. Ordinarily the writ will not lie where there is a remedy by a writ of error or appeal; but in rare and exceptional cases it *may be issued,* although such remedy exists." (Italics ours.)

In *In re Watts & Sachs,* 190 U. S., 1, at p. 35, on habeas corpus and certiorari to review a contempt commitment this court discharged the petitioners upon the ground that *"there was no legal evidence* to sustain these convictions for contempt."

In *Hyde* v. *Shine,* 199 U. S., 62, at p. 84, this Court recognized that on habeas corpus "if there is an entire lack of evidence to support the accusation the Court may order his discharge."

This Court, in discharging a prisoner, said in *Ex parte Hudgings,* 249 U. S., 378, 379:

> "The grounds for discharge were, that the Court had exceeded its jurisdiction by punishing as a contempt an act which it had no power to so punish, and that even if the act punished was susceptible of being treated as a contempt, the action of the Court was arbitrary, beyond the limits of any discretion possessed, and violative of due process of law under the Fifth Amendment."

The decision in the *Hudgings* case, *supra,* we urged below, and again urge, as determinative of the two main points involved; (a) that there was no contempt because there was no obstruction to the administration of justice, and (b) that the relief against imprisonment is by habeas corpus, where the element of obstruction is lacking

That was an original application to this Court

for a writ of habeas corpus to relieve against a contempt commitment for asserted false testimony of a witness. The application to the Court did not differ in kind from an application to a judge of a lower court, as we have seen.

So we start, in considering the *Hudgings* case, with the comprehension that Judge MANTON, either in his capacity as a circuit judge or under his designation to perform the duties of a district judge, had the same power as the Supreme Court to issue and sustain the writ.

The only difference in the procedure was that in the instant case "testimony" was taken, as provided in the Habeas Corpus Act (R. S., Sec. 761), so as to present the whole record, while in the *Hudgings* case that was done by setting forth the proceedings in the petition, "and a transcript of the stenographer's notes showing what transpired in the Court below, made a part of the argument of the petitioner and in substance conceded by all parties to be the record" (p. 380). We may say, parenthetically, that that was the course pursued in *Cuddy, Petitioner,* 131 U. S., 280, 281.

What the petitioner asserted, in the *Hudgings* case and the Court understood him to assert, as a foothold for relief on habeas corpus, was (a) "that the Court had *exceeded its jurisdiction* by punishing as a contempt (b) *an act* which it had *no power to so punish,* and (c) that the action of the Court was arbitrary, beyond discretion and violative of due process. A clear appreciation of these points, separately, disposes, we think, of the distinctions which were suggested by the Court below in the instant case. Note the use of the expressions in the *Hudgings* case, carried throughout the opinion "exceeded" and "excess" in relation to jurisdiction and power, which are asserted here in challenging jurisdiction. The reason that those

terms are appropriate is because its jurisdiction is a *limited* one, since the Act of 1831; now embodied in the Judicial Code, §268, quoted at p. 18, *supra*, hence the expressions "excess of jurisdiction" and "excess of power" are peculiarly appropriate. In discussions of constructive contempt the statutorially limited jurisdiction of the United States courts is all too frequently lost sight of, as it was below, in the citation of English and state court cases.

Next there should be noted that Mr. Chief Justice WHITE, in the *Hudgings* case, spoke of "an act which it had no power to so punish," and later on he defined what was such an act and the incidence of power to punish.

There is no plenary power to punish an act alleged to be contemptuous; it must fall within the statutory *proviso*. A proceeding to punish for alleged contempt is *sui generis* in the mode of accusation, the method of inquiry and even in the mode of punishment (*Creekmore* v. *United States*, 237 Fed. Rep., 743; *Merchants Stock & G. Co.* v. *Board of Trade*, 201 Fed., 20). This was also referred to later on in the opinion in the *Hudgings* case (at p. 383). Because it is *sui generis*, mere allegation is not sufficient. An information may be useful to establish the confines of the inquiry, but it is not provided for in any statute relating to contempt, nor by any criminal procedure on the subject. It does not give jurisdiction. It is not like an indictment, nor even like an Information touching a statutory offense or a common law crime. It is not accompanied by process. The order to show cause which usually accompanies it, as in this case, has no jurisdictional force over a person not a party to a pending proceeding. An *act* which the Court has *power* to punish is the requisite of its juris-

diction, as is clearly pointed out by Mr. Chief Justice WHITE, in the *Hudgings* case.

The Court proceeded (at pp. 379 and 380) to state the duty of the Court to consider the case as within the exception to the rule established by this Court to justify "resort to the original jurisdiction of this Court." That exception has nothing to do with an application to a lower court or judge where such a rule does not obtain. We make mention of it only because of the suggestion in the opinion of the court below that "what was done in the *Hudgings* case was done at least by a court empowered to review and set aside erroneous judgments in appropriate proceedings." (Record, p. 1153, fol. 3458.) Palpably this Court was exercising its original jurisdiction, not its powers of review.

Continuing our analysis of the *Hudgings* case, *supra*, the opinion then proceeded to state the manner in which the alleged contempt occurred, including the following (at p. 381):

> "Finally the Court interrupted the examination by saying:
>
> " 'This witness is going to be committed for contempt of court. The Court is thoroughly satisfied, Mr. Witness, that you are testifying falsely when you say that you cannot recall of ever seeing Mr. MacMillan write, and this has happened several times during this trial with other witnesses, especially with your wife * * *
>
> " 'And it becomes the plain duty of the Court to commit you to jail, sir, for contempt, and before doing so, I think it is the duty of the Court to explain to you that the answer, "I do not remember of ever having seen him write," is just as false, is just as much contempt of court if you have seen him write, as it would be for you to say that you had never seen him write, without using the expression, "I do not remember".' "

"In the same direction the Court said:

"'I am not going to allow you to obstruct the course of justice here, and if this nation has delegated power enough to this Court, and I am very sure it has, to deal with you in the manner proposed, I am going to do it.'"

The Petition in the record of that case (pp. 25, 26) contained a further transcript of what took place:

"The Court: Tell the Court whether you care to *take any further time on this matter,* do you?

"The Witness: My time is your time.

"The Court: I suggest that you might *confer with counsel.*

"The Witness: *No, sir,* my answers will be exactly *as they have been.*

"The Court: *Very well. You are adjudged to be in contempt* of this Court and you are ordered to be committed to jail forthwith. Mr. Clerk, you prepare the commitments. You are in the custody of the marshal from now on."

No reference is made in the opinion of the Court below in the instant case to the above quotation from the record in the *Hudgings* case, which was abstracted at length in our printed brief before the Court below. On the other hand the Court below said: "In the *Hudgings* case, *without* proof of guilt, without evidence, without any hearing, the Court forthwith ordered the imprisonment," etc. (Record, p. 1152, fol. 3456.)

It will be observed that (a) an opportunity to confer with counsel and for purging was allowed, such as it was, and (b) that the Court had concluded that the act did obstruct justice, though there was no written finding to that effect. Slight safeguards for the liberty of the citizen, it is true, but sufficient to require this Court to determine the main question of the "erroneous doctrine" of the power of the Court.

This Court stated the question as follows in the *Hudgings* case:

> "Whether, then, power to punish for contempt exists in every case where a court is of the opinion that a witness is committing perjury is the test we must here apply" (p. 382).

The procedural points and the punishment were passed by in the determination of the great principle involved. That appears in the language of the opinion (at p. 383):

> "Existing within the limits of and sanctioned by the Constitution, the power to punish for contempt committed in the presence of the court is not controlled by the limitations of the Constitution as to *modes of accusation* and *methods of trial* generally safeguarding the rights of the citizen." (Italics ours).

Had the Court intended to rest its decision either on the mode of accusation or the method of trial, the language quoted would have been quite beside the mark.

The opinion proceeds:

> "This, however, expresses no purpose to exempt judicial authority from constitutional limitations, since its great and *only purpose* is to secure judicial authority from *obstruction in the performance of its duties* to the end that means appropriate for the preservation and enforcement of the Constitution may be secured." (Italics ours). (Citing *Toledo Newspaper Co.* v. *United States,* 247 U. S., 402; *Marshall* v. *Gordon,* 243 U. S., 521.)
>
> "An obstruction to the *performance* of judicial duty *resulting from* an act done in the presence of the Court is, then, *the characteristic* upon which *the power* to punish for contempt *must rest.*"

We have, then, (1) the purpose—the only purpose; (2) the characteristic act, and (3) the result, on which (4) the power must rest.

"Obstruction"—is the monumental thing.

We turn now to the point of next importance, stated at the head of this point: The exertion of the power, and means of enquiring into it by habeas corpus.

The Court, following on directly from the language above quoted, said (at p. 383):

> "This being true, it follows that the *presence* of that element *must clearly be shown* in every case where the power to punish for contempt is *exerted*—a principle which, applied to the subject in hand, exacts that in order to punish perjury in the presence of the court as a contempt there must be added to the essential elements of perjury under the general law the further element of obstruction to the court in the performance of its duty."

In the use of the expression "the presence of that element must clearly be shown" the Court doubtless had in mind that when acting under the Federal Contempt Statute the Court is exercising a *limited jurisdiction* which may always be challenged, not the general jurisdiction of a superior court.

The predicate, upon which the Court granted the writ and discharged the petitioner, was that when a commitment is attacked upon the ground "that the court had exceeded its jurisdiction," the *presence, i.e.,* the *existence* of the element of an obstruction to the performance of judicial duty *must clearly be shown,* where the power has been exerted. Not merely that it must be charged, generally or indefinitely, but must be shown to exist.

This is made plainer still by the next paragraph of the opinion (at p. 384):

> *"Testing the power to make the commitment* which is under consideration in this case by the principles thus stated, we are of opinion that the *commitment was void for excess of power*—a conclusion irresistibly following from the fact that the *punishment was imposed for* the supposed perjury alone without reference to any *circumstance or condition* giving to it an obstructive effect."

The conclusion of the Court that the punishment was imposed "without any reference to any circumstance or condition giving to it an obstructive effect" was directly in the face of the pronouncement of the Judge below, which we have quoted from the report of the case at page 381:

> "I am not going to allow you to obstruct the course of justice here."

That was passed by to ascertain whether the presence or existence of an obstructive act was "clearly shown."

Far from being clearly shown in the instant case, there is an express admission in the Return, as we have seen (Record, fols. 2526-2528) that:

> "On October 6, 1919, there was not pending awaiting decision any order or judicial determination mentioned in the letter of that date from the petitioner to Lewis Nixon, set forth in the Information, but the same was still within the control of the District Court of the United States for the Southern District of New York and subject to change."

With that admission in the Return the instant case is stronger for the petitioner than was the *Hudgings* case for the petitioner there.

Does the all-important expression in the *Hudgings* case that we have quoted, with the context (*supra*), "Testing the power to make the commitment," mean less or other than that it is the office

of this great writ, and of the Court or Judge issuing it, to test the power, by that means and in that way, to make the commitment, by looking into the record deep enough to ascertain whether the presence—not merely the charge or opinion—of an obstruction to judicial duty was clearly shown.

And why should that not be so? A citizen, in this case a public official who is presumably trying to do his duty—even if mistakenly—in the same way as the Judge is trying to do his, is haled into court upon an assertion that he has obstructed the Judge in the performance of his judicial duty; the charge is directed by the same Judge and tried before the same Judge, against the protest of the citizen that another Judge be designated to hear the proceeding, and he is committed for a long period. Why should not some other judge or set of judges forthwith test the commitment by enquiring whether the presence or existence of the act of obstruction was clearly shown, and not merely that the accusing Judge, who was also the Trial Judge, thought that an obstruction was intended. If all of the ordinary modes of accusation and methods of trial are laid aside to preserve the integrity of the administration of justice, ought not the presence or existence of the obstruction be required to "clearly be shown" in a like summary way before another judge or judges, in "every case," as Chief Justice WHITE used those terms?

The principal reason why an inquiry in a contempt case into the jurisdiction is proper by habeas corpus proceedings, is that the jurisdiction of the United States Courts, since the act of 1831, following the Peck impeachment and now embodied in the Judicial Code, is limited in every case upon a proviso appearing on the very face of the Statute. While, therefore, there is inherent power in the United States Courts to punish for contempts, it is

a limited power, and for that reason may be examined into in "every case."

The Court below said: "In the present case sentence was imposed at the end of legal proceedings of a thorough and deliberate nature," etc. That the legal procedure has been deliberate and thorough has nothing to do with the principle involved. Analogy or lack of analogy does not depend on speed or brusqueness.

Judge ROGERS in the Court below said that the *Hudgings* case was of a "remarkable and exceptional character. The case stands by itself and is properly regarded as *sui generis*" (fol. 3455), and the learned prosecuting attorney said that "That case was entirely *sui generis*. It stands alone."

The term *sui generis* is the one that is usually applied to all indirect contempt proceedings. It certainly demonstrated that, without the great power of the writ, the petitioner might rot in jail without redress—but regardless of its impelling facts, the case is most notable for the clarity of its reasoning on the essential jurisdictional elements of the contempt statute, the only pronouncement of this Court on that subject in many generations.

The *Hudgings* case did not rest on lack of deliberateness, or thoroughness, or exceptional expedition. We have already pointed out that, in the opinion in that case, emphasis was laid upon the fact that the ordinary methods of accusation and trial might be dispensed with in contempt cases.

The concluding comment of the Court below in the instant case (Record, fols. 3460-3461):

> "We find no reason why this case is not governed by the general rule that a habeas corpus proceeding cannot be used as a writ of error but must be limited to jurisdictional questions,"

shows a total disregard of the main attack made by us upon the conviction, which is upon jurisdictional grounds; our position is and has been always that the ordinary procedure in a contempt case where the Court lacks jurisdiction, or has exerted "excess of power," is to proceed by a writ of habeas corpus and not by writ of error.

In *Ex parte Lange,* 18 Wall, 163, 165-178, this Court said:

> "On consideration of the petition, which was filed in this case at a former day, the Court was of opinion that the facts therein recited very fairly raised the question whether the Circuit Court, in the sentence which it had pronounced, and under which the prisoner was held, had not exceeded its powers. It therefore directed the writ to issue, accompanied also by a writ of certiorari, to bring before this Court the proceedings in the Circuit Court under which the petitioner was restrained of his liberty. The authority of this Court in such case, under the Constitution of the United States, and the 14th section of the Judiciary Act of 1789, to issue this writ, and to examine the proceedings in the inferior Court, so far as may be necessary to ascertain whether that Court has exceeded its authority, is no longer open to question. The cases cited in the note below (*Hamilton's case,* 3 Dall., 17; *Burford's case,* 3 Cranch, 448; *Ex parte Bollman,* 4 Cranch, 75; *Ex parte Watkins,* 3 Pet., 193; S. C., 7 Pet. 568; *Ex parte Metzger,* 5 How., 176; *Ex parte Kaine,* 14 How., 103; *Ex parte Wells,* 18 How., 307; *Ex parte Milligan,* 4 Wall., 2; *Ex parte McCardle,* 6 Wall., 318; S. C., 7 Wall., 506; *Ex parte Yerger,* 8 Wall., 85) will, when examined, establish this proposition as far as judicial decision can establish it.
>
> "Disclaiming any assertion of a general power of review over the judgments of the inferior courts in criminal cases, by the use of the writ of habeas corpus or otherwise, we pro-

ceed to examine the case as disclosed by the record of the Circuit Court and the return of the marshal, in whose custody the prisoner is found, *to ascertain whether it shows that the Court below had any power to render the judgment by which the prisoner is held.*

* * * * * * * * *

"There is no more sacred duty of a Court than, in a case properly before it, to maintain unimpaired those securities for the personal rights of the individual which have received for ages the sanction of the jurist and the statesman; and in such cases no narrow or illiberal construction should be given to the words of the fundamental law in which they are embodied. Without straining either the Constitution of the United States, or the well settled principles of the common law, we have come to the conclusion that the sentence of the Circuit Court under which the petitioner is held a prisoner was pronounced without authority, and he should, therefore, be discharged."

In *Hans Nielsen, Petitioner,* 131 U. S., 176, at p. 184, Mr. Justice BRADLEY said, delivering the opinion of the Court reversing, on appeal, a final order refusing to issue a habeas corpus, and directing that a writ issue:

"A party is entitled to a habeas corpus, *not merely where the court is without jurisdiction of the cause, but where it has no constitutional authority or power to condemn the prisoner.* As said by Chief Baron GILBERT, in a passage quoted in *ex parte Parks,* 93 U. S., 18, 22: 'If the commitment be against law, as being made by one who had no jurisdiction of the cause, or for a matter for which by law no man ought to be punished, the court (*sic*) are to discharge.' This was said in reference to cases which had gone to conviction and sentence. Lord HALE laid down the same doctrine in almost the same words (2 Hale's Pleas of the Crown, 144). *And why should not such a rule prevail in favorem*

liberatis? If we have seemed to hold the contrary in any case, it has been from inadvertence."

This case is most valuable, for there could be no doubt that the Court had jurisdiction of the cause, viz., the crime of unlawful cohabitation for which he was convicted and punished, but the Court sustained the writ upon the ground that the Court below had no constitutional authority or power to condemn the prisoner, for the reason that the crime of adultery with which he was charged, although on different dates, was included in the crime of unlawful cohabitation. For that purpose the Court went behind the record and looked into the facts, saying in conclusion (pp. 190-191):

> "The Court was without authority to give judgment and sentence in the latter case, and should have vacated and set aside the same when the petitioner applied for a habeas corpus."

In the dissenting opinion of LEARNED HAND, *J.*, below he says: "With the exception of *Ex parte Kearney* (7 Wheat. 78) I have found no case in the Supreme Court which refused to consider the merits, at least, to determine whether the offense was in fact within the Statute of Contempts" (Record, p. 1168, fols. 3494 and 3495) and he goes on to say: "Moreover, the case was decided before 1831, when the common law powers of the Court were first limited by the proviso of Section 268" (Record, page 1168, fol. 3496). And still further: "The cases are clear authority for the proposition that habeas corpus will, at times anyway, examine whether the underlying facts necessary to the commitment exist" (Record, page 1170, fol. 3500).

The trend of the decisions of this Court has shown a steady broadening in the conception of the elements of jurisdiction, when questioned col-

laterally whether by habeas corpus or otherwise. The rigid definition of jurisdiction in *Ex parte Watkins*, 3 Peters, 193, and *Ex parte Kearney*, 7 Wheaton, 38, where the only elements considered were parties and ostensible subject matter, was expanded in the opinion of Mr. Justice SWAYNE in *Cornett* v. *Williams*, 20 Wall., 250, where he spoke of "within the *power* of that jurisdiction, when collaterally questioned" and in the opinion of Mr. Justice FIELD in *Windsor* v. *McVeigh*, 93 U. S., 274, where he used the expression "cannot then *transcend* the power conferred by law." In *Ex parte Parks*, 93 U. S., 18, we find the same thought expressed in a habeas corpus proceeding: "if it (this Court) finds that the Court below has *transcended* its powers" relief would be granted. In *Ex parte Reed*, 100 U. S., 13, 23, we find Mr. Justice SWAYNE again referring to "jurisdiction *to give the judgment rendered*" and "every act of a court beyond its jurisdiction is void." In *Cuddy, Petitioner*, 131 U. S., 280, 286, the expression is "beyond the jurisdiction." In *Hans Nielsen, Petitioner*, 131 U. S., 176, 184, the Court said there must be not only jurisdiction of the cause but "authority or power to condemn the prisoner." In *Matter of Gregory*, 219 U. S., 210, the Court assumes a case where "the judicial judgment cannot be said to have been invoked." These reached the ultimate phrase in the succinct words in *Ex parte Hudgings* (*supra*), "excess of power."

POINT IX

The disregard, by the Court below, of the statutory proviso of punishment for obstructive misbehavior, only, and the limitations sought to be placed by the Court below on the scope of the writ of habeas corpus are not in accord with the rulings of this Court.

The Circuit Court of Appeals below, in considering the subject matter of contempt in its opinion, cited and relied upon the common law rule as laid down in the old cases such as *Brass Crosby, Lord Mayor of London,* 3 Wilson, 188, and under our former contempt statute, such as *Ex parte Watkins,* 3 Peters, 193, and *Ex parte Kearney,* 7 Wheat, 38, and gave no effect whatever to the limitation of the jurisdiction as now provided in the Statute. Judge ROGERS quoted from *Ex parte Robinson,* 19 Wall, 505, 510, as follows (*Record,* page 1156, fols. 3464-3465):

> "The moment the Courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power."

But he omitted the most significant part of the paragraph from which the quotation was made, the next sentence, viz.:

> "But the power has been limited and defined by the Act of Congress of March 2, 1831."

The learned prosecuting attorney had made the same omission in quotation, and we had called attention to the omission in our printed brief before the Court, but the Court took no notice of it in its opinion.

Ex parte Kearney (*supra*) and *Ex parte Watkins*

(*supra*) were decided before the Act of 1831 (now carried into the Judicial Code as §268) which introduced the proviso of obstructive misbehavior as the basis of contempt, and while the opinions were those of great judges, they are no longer applicable, we submit. If those cases are to be regarded as controlling what effect is to be given not only to the proviso but to the broadened scope of the habeas corpus act of 1867 (vide pp. 90-110, *supra*).

The expression that a writ of habeas corpus cannot be used to perform the functions of a writ of error, has no application to such matters as relate to the jurisdictional power of the Court, especially in view of the liberalizing tendency in the scope of habeas corpus since the enactment of the Habeas Corpus Act of 1867.

We freely concede that the writ of habeas corpus may *not* be employed as an anticipatory writ of error, such as was discountenanced in *Henry* v. *Henkel*, 235 U. S., 219; *Rumely* v. *McCarthy*, 250 U. S., 283, and similar cases. But generally the rule of procedure for which such cases stand is quite beside the right to attack by writ for lack of jurisdiction or excess of power.

In fact one of the exceptions to the general rule as established in *Henry* v. *Henkel, supra*, is "(5) the judgment or order under which he is held is a nullity because in excess of the power of the Court."

The two cases chiefly relied upon by the learned prosecuting attorney on the argument below, *Ex parte Parks*, 93 U. S., 18, and *Ex parte Yarbrough*, 110 U. S., 651, recognize the principles for which we contend.

In *Ex parte Parks, supra*, which was a petition for habeas corpus, Mr. Justice BRADLEY, delivering the opinion of this Court, said:

> ' 'From this review of the law it is apparent, therefore, as before suggested, that in a case like the present, where the prisoner is in execution upon a conviction, the writ ought not to be issued, or, if issued, the prisoner should at once be remanded, if the Court below had jurisdiction of the offense, *and did no act beyond the powers conferred upon it.* The Court will look into the proceedings so far as to determine this question. If it finds that the Court below has *transcended its powers,* it will grant the writ and discharge the prisoner, even after judgment." Citing *Ex parte Kearney,* 7 Wheat., 38; *Ex parte Wells,* 18 How., 307; *Ex parte Lange,* 18 Wall., 163. (Italics ours.)

The proper application and limitation of *Ex parte Parks,* cited by the Government, is expressly pointed out in *Ex parte Siebold,* 100 U. S., 375, in the following language: "This distinction between an erroneous judgment and one that is illegal or void is well illustrated by the two cases of *Ex parte Lange,* 18 Wall., 163, and *Ex parte Parks,* 93 U. S., 18."

In *Ex parte: Jasper Yarbrough,* 110 U. S. 651-667; decided Mar. 3, 1884, the other case much relied upon by the prosecuting attorney, this Court likewise recognized the principle for which we contend.

Mr. Justice MILLER delivered the opinion of the Court:

> "That this Court has no general authority to review, on error or appeal, the judgments of the Circuit Courts of the United States in cases within their criminal jurisdiction, is beyond question; but it is equally well settled that when a prisoner is held under the sentence of any Court of the United States in regard to a matter *wholly beyond or without the jurisdiction of that Court,* it is not only within the authority of the Supreme Court but it is its

duty to inquire into the cause of commitment when the matter is properly brought to its attention, and if found to be as charged, a matter *of which such a Court had no jurisdiction, to discharge a prisoner from confinement.*" Citing *Ex parte Kearney,* 7 Wheat., 38; *Ex parte Wells,* 18 How., 307; *Ex parte Lange,* 18 Wall., 163; *Ex parte Parks,* 93 U. S., 18. (Italics ours.)

The case of *United States* v. *Pridgeon,* 153 U. S., 49, 51, is frequently cited as indicating a limitation upon the powers of the Court to examine into the merits on habeas corpus, but rightly understood it should not be so considered. The question there arose on a certificate from the United States Circuit Court of Appeals for the Sixth Circuit, of questions for the decision of the Supreme Court in a proceeding by habeas corpus, issued by the United States Circuit Court for the Southern District of Ohio, Eastern Division, upon which that Court discharged the petitioner, Sidney S. Pridgeon, from confinement under a conviction, in the District Court, for horse stealing, and from which decision the United States appealed to the Circuit Court of Appeals.

Mr. Justice JACKSON delivered the opinion of the Court:

"Under a writ of habeas corpus the inquiry is addressed not to errors but to the question whether the proceedings and the judgment rendered therein, are for any reason, nullities, and unless it is affirmatively shown that the judgment or sentence, under which the petitioner is confined, is void, he is not entitled to his discharge.

* * * * * * * * *

"We have not deemed it necessary to review or to attempt to reconcile the authorities on the question for the reason that while all concede that neither irregularities nor error, so

far as they were within the jurisdiction of the court, can be inquired into upon a writ of habeas corpus—because a writ of habeas corpus cannot be made to perform the functions of a writ of error in relation to proceedings of a Court within its jurisdiction—*they differ widely as to what constitute error, and what should be regarded as rendering the judgment or proceedings void*" (Italics ours).

That differing of views continues to this day, with some elucidation. If there be two views in the instant case let us heed the admonition of Justice MILLER in *Ex parte Lange*, 85 U. S., 18 Wall., 163; "In such cases no narrow or illiberal construction should be given to the words of the fundamental law in which they are embodied."

In considering the expressions in some of the text books that were published before the decision of the Court in *Ex parte Hudgings*, 249 U. S., 378, it should be borne in mind that that case expresses more fully and more definitely the right to and the grounds of the issuance and office of a writ of habeas corpus in contempt cases than many of the earlier cases.

In Foster's Federal Practice, 6th Edition, recently published, the *Hudgings* case is frequently cited and its broadening effect is plainly shown.

A contempt proceeding has frequently been described as *"sui generis"* (*Creekmore* v. *United States*, 237 Fed. Rep., 743), and many of its anomalies and anachronisms are brushed aside by resort to that phrase. We do know that it is described, and well described, as "summary," lacking many of the safeguards of the liberty of the citizen (*Merchants Stock & G. Co.* v. *Board of Trade*, 201 Fed., 20; *Ex parte Hudgings, supra*). To remedy the excess of power in such a proceeding is there anything more appropriate than the "summary" proceeding provided by the Habeas Corpus Act, "to

dispose of the party as law and justice require?" (R. S. 761).

We have referred to the contentions of the Government with respect to the *Hudgings* case in our review of that case (*supra*).

Even though the only question that the Court on habeas corpus can look into is one of jurisdiction, broadly considered, the cases show that the Court may look into the facts upon which the conviction was based, to the extent that it affects the jurisdiction of the Court which assumed to make the adjudication. That is the very thing that was done in *re Mayfield,* 141 U. S., 107, 116, where this Court looked into the record and also the concessions *dehors* the original record, for the purpose of ascertaining whether the alleged crime for which the petitioner was convicted was in reality a crime.

The scope of the writ, as applicable to the case at bar, has been indicated by this Court:

> "If the appellant had alleged such facts as indicated that the misbehavior with which he was charged was not such as, under Section 725 of the Revised Statutes, made him liable to fine or imprisonment, at the discretion of the Court, he would have been entitled to the writ, and, *upon proving such facts, to have been discharged. Such evidence would not have contradicted the record.*"
>
> *Cuddy, Petitioner,* 131 U. S., 280, 286.

The petition for the writ in the case at bar alleged the facts which indicated that the misbehavior with which petitioner was charged was not such as to be punishable by imprisonment. (Record, pages 38-42, fols. 112-124.)

As in the *Hudgings* case (*supra*), all the testimony and proceedings in the District Court on the contempt trial was pleaded and proved (Rec-

ord, page 880, fol. 2639). That method of procedure is expressly sanctioned by the Habeas Corpus Act.

It is unquestionably true that the Court may not, on a trial on habeas corpus, pass upon any *controverted* question of fact in the record of the contempt proceeding. The exact language of the command of the Habeas Corpus Act directs a summary hearing *"so that thereby the material facts may be ascertained"* and the matter disposed of *"as law and justice require"* (U. S. Rev. Stat. §§754, 757-761, *Cuddy, Petitioner,* 131 U. S., 280). It contemplates the taking of new evidence, if any such be offered, as was done in the instant proceeding, and such testimony is admissible "of facts outside of, but not inconsistent with the record" (*In re Mayfield,* 141 U. S., 107, 116; see also *Ex parte Lange,* 85 U. S., 18 Wall., 163).

In the instant proceeding (1) The return admitted that on October 6th, 1919, the date when the letter complained of was written, there was not pending awaiting decision any order or judicial determination mentioned in the letter (Record, fols. 2526, 2527). That was a fact outside of and not inconsistent with the contempt record. (2) *Proof was introduced* before Judge MANTON by the petitioner (a) of all the testimony and evidence taken in the District Court and (b) by concession and *stipulation* that there was no other evidence in the contempt record (Records, pages 877, 880; fols. 2631, 2639).

In *Cuddy, Petitioner* (*supra*) "all the minutes, records and files of the Court in the proceedings for contempt" were set out in the petition, instead of being proven on the hearing, and the Court discussed the facts fully. That course was also adopted *In re Hudgings* (*supra*). We have in the

case at bar the like of all that was before this Court in those cases.

That proof, *which is original proof in this proceeding,* demonstrates the non-existence in the District Court of the jurisdictional facts. The judge on the summary hearing, following the granting of the writ, was enabled to and was not precluded from coming to a determination, that there was "manifest want of criminality in the matter charged." *Ex parte Siebold,* 100 U. S., 376.

That was not a review of the proceedings before Judge MAYER, as by writ of error or appeal, as has been suggested, but the result of the summary hearing on the writ of habeas corpus, not inconsistent with the record in the District Court, as to the existence of the jurisdictional facts (*In re Mayfield,* 141 U. S., 107, 116). The point was tendered by the petition and was admitted by the return, as we have seen.

The summary hearing provided for in the Habeas Corpus Act "so that thereby the material facts may be ascertained" (U. S. Rev. St. §§754, 757-761), avoids any necessity for a writ of *certiorari,* which is sometimes issued as an auxiliary to a writ of habeas corpus. In the instant case, not only did the petitioner make proof, but express stipulation was made, that there was no other evidence before the District Court (Record, fols. 2631-2640). This fulfills the *concept* of a writ of certiorari frequently used as an auxiliary writ.

POINT X.

The objections raised to the form of the writ were unavailing to oust the circuit judge of power to act.

The majority judges of the Circuit Court of Appeals, in their opinions in this case, treat the writ of habeas corpus as defective in form. Circuit Judge HOUGH went so far as to say: "The so-called writ in this instance was a nullity * * *."

(Record, pages 1141-1142, fols. 3423-3426; pages 1159-1160, fols. 3477-3478.)

This was based on the circumstance that the paper lacked the seal of a Court and the teste of a Clerk. If a like contention be urged in this Court, we respectfully submit that Judges ROGERS and HOUGH misinterpreted the provisions of the Revised Statutes. They failed to recognize that, by reason of the nature of the writ and the manner of its use, an informality is permitted that might not be allowed in other cases. Section 751 relates to a writ of habeas corpus from the several *courts* mentioned and the words there used are "to issue all writs." The word "issue" is distinctly appropriate to a Court and in such instances the writ is allowed by the Judge and issued by the Clerk under the seal of the Court and attested by the Clerk under the seal of the Court, the three several acts, *i. e.*, allowance, signature and sealing being steps in the issuance of the writ. The provisions of Section 752 relate to the grant of a writ by the several *Justices and Judges* of said Courts. The word used is "grant," and it is distinctly appropriate to one function and the act of one functionary, in giving or granting the writ. When a thing is granted in ordinary legal parlance, nothing remains to be done; it is complete in itself; it needs not the sig-

nature of another, nor a seal impressed by another to effectuate it.

There are words of cognate value used in Section 754. The expression used there is "Application for writ of habeas corpus shall be made to the Court or Justice or Judge *authorized to issue* the same." This plainly implies that a Judge has authority not only to allow the writ, but also to issue it.

Under Section 755 the expression is "The Court or Justice or Judge to whom such application is made shall forthwith *award* a writ of habeas corpus," etc.

In making the formal return the Marshal stated that it was to the writ "issued herein" and "as commanded by the writ of habeas corpus herein."

The right to *grant* the writ is given to certain Judges, in addition to the right given to certain Courts to *issue* the writ. Revised Statutes, Section 752.

Circuit Judge HOUGH, in the Court below, by a fine-drawn distinction between the word "issue" in Section 751 and "grant" in Section 752 of the Revised Statutes, held that the power of the judge under the latter section was limited to the allowance of the issuance of the writ pursuant to the former section. His argument flies squarely in the face of the opinion of this Court in construing the power of court and judge under exactly identical language. *Ex parte Milligan,* 4 Wall., 2, 4, 110.

When so granted, the writ under the sign manual of a Judge, authorized to issue it, is as valid and effectual as though issued out of and under the seal of a Court. *In the Matter of Blair,* 4 Wis., 522, 531; as distinguished from writs issued out of Court. *State ex rel Taylor* v. *The Board of Supervisors,* 64 Wis., 218, 221-2. See also *Potter* v. *Frohbach,* 133 Wis., 1, 7-8.

The writ of habeas corpus granted in *Ex Parte Curtis,* 106 U. S., 371, was signed "M. R. Waite, Chief Justice of the United States," without teste, seal or clerk's signature, and was made returnable before "the Chief Justice of the Supreme Court of the United States" in New York City (See Transcript of Record in that case at page 2).

Section 911 of the Revised Statutes relates only to writs of Courts, as distinguished from writs granted by Judges, and it is, therefore, inapplicable in the case at bar. The practice adopted by the Chief Justice in the *Curtis* case disposed of the objections to the writ made by Circuit Judges ROGERS and HOUGH in the portions of their opinions quoted at the head of this point.

The learned United States Attorney objected that the writ was not upon its face directed to the Marshal or to anyone else. The words of the statute are:

> "The writ shall be directed to the person in whose custody the party is detained."

In this instance, it is true that the writ does not upon its face contain the name of the Marshal. It does contain, however, the words:

> "*We command you* that the body of Charles L. Craig, *in your custody detained,* as it is said."

It was thus directed to the person who had the custody, as directly as though he were named, and was so understood. Service of the writ upon the Marshal was followed by the immediate production of the body of the petitioner by the Marshal "as required by the writ" (Record, page 869; Statement of Facts prepared by the United States Attorney, Record, page 887). Later, without making any motion to quash (Record, page 871), the Marshal filed "*his* return *to the writ* of habeas corpus